

IN THE U.S. DISTRICT COURT FOR MARYLAND,
SOUTHERN DIVISION

BEYOND SYSTEMS, INC.

Plaintiff

v.

WORLD AVENUE USA, LLC, ET AL.

Defendants

*
*
*
*
*
*
*
*
*

Case No. 8:08-cv-00921

DECLARATION OF DANIEL L. BALSAM

I declare under penalty of perjury under the laws of State of Maryland that the following statements are true and correct.

I am over the age of 18 years, have personal knowledge of the matters stated below, and am competent to testify to these matters. I am an attorney admitted to practice law in the state of California.

I was the *pro se* plaintiff in *Balsam v. World Avenue USA, LLC*, Case No. 821162, Superior Court of California, County of San Francisco, which was tried in open court on August 31, 2007 and resulted in an appeal heard on May 1, 2008. In that case I alleged that World Avenue USA, LLC had violated certain anti-spam laws.

The documents listed below as Exhibits 001 through 005 were filed in Case No. 821162 described above. The descriptions of the documents below are accurate and correct. Accurate copies of those documents are attached to this Declaration.



Daniel L. Balsam
3145 Geary Blvd. #225
San Francisco, CA 94118
Phone: (415) 869-2873

Date: November 23, 2010

Exhibits

001 – 12/1/05 Letter from "Jeffrey Richard, Manager, Compliance and Policy Enforcement Officer," to Daniel L. Balsam.

002 – 5/27/08 Decision on Small Claims Trial de Novo, Superior Court of California, County of San Francisco, Case No. CSM-07-0821162, 14 pp.

003 – 9/20/07 Defendant World Avenue U.S.A., LLC's Trial Brief, signed by "Jeff Richard, World Avenue U.S.A., LLC, Defendant, In Propria Personam." Proof of Service by signature that appears to be Jeff Richard, stating "not a party to the within action."

004 – 9/21/07 Declaration of Jeff Richard in Support of Defendant World Avenue U.S.A., LLC's Trial Brief, Case No. 821162, Decision on Small Claims Trial de Novo, Superior Court of California, County of San Francisco, Trial date: August 31, 2007; "Jeff Richard, Manager, Compliance and Assessment, World Avenue USA, LLC."

005 – 4/10/08 Defendant World Avenue U.S.A., LLC's Small Claims Appeal Trial Brief, signed by "Ira P. Rothken, Attorneys for Defendant World Avenue U.S.A., LLC." Proof of Service by signature that appears to be Jeff Richard, stating "not a party to the within action."

EXHIBIT 1

5255 North Federal Hwy, 3rd Fl.
Boca Raton, FL 33487
December 1, 2005

Daniel L. Balsam
3145 Geary Blvd. #225
San Francisco, CA 94118

Via FedEx

RE: October 31, 2005 Letters to SuperbRewards, YourSmartRewards, Incentive Reward Center
& Allegations of Unlawful Email Advertising - Violations of California Civil Code § 1770

Dear Mr. Balsam,

I am writing to you regarding your letters referenced above of October 31, 2005 asserting unlawful email advertising in violation of California Civil Code § 1770. Your letters offer no facts to support your allegations of deception. Additionally, you have not provided any practical way for us to analyze the integrity of your claims or to investigate such claims.

Accordingly, in order to allow a thorough and prompt investigation regarding your claims, please provide further factual data that you contend supports your allegations, including, but not limited to, full, unredacted email exemplars, including printed and digital versions with header data intact.

If we come to learn, after reviewing this evidence and doing an investigation, that a particular email message is not in compliance with applicable law we would agree to take prompt remedial action. If you provide your email address(es) we will opt you out, if under our control, immediately.

You should be aware that we diligently comply with applicable law regarding email advertising and we honor agreements and requests to opt in and opt out.

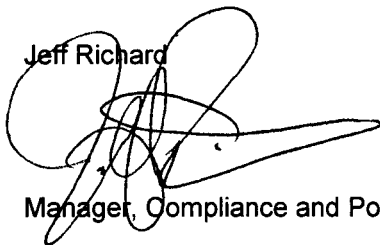
You appear to allege some sort of "deception" related to the opt in/opt out procedure. Please provide the email address(es) which you claim were involved in the alleged "deception" so that we can investigate your claim that you did not "opt in" or, by implication, that you may have opted out. Without such data we cannot practically assist you.

Finally, it appears that your alleged claims would be preempted by the Federal CAN-SPAM Act, since what you describe is the alleged sending of unsolicited email, rather than facts that would fit any "deception" exception to preemption contemplated by Congress.

We look forward to receiving the additional information requested.

Sincerely,

Jeff Richard

A handwritten signature in black ink, appearing to read 'Jeff Richard', with a large, stylized flourish extending to the right.

Manager, Compliance and Policy Enforcement Office

EXHIBIT 2



San Francisco Superior Courts
Information Technology Group

Document Scanning Lead Sheet

May-28-2008 4:19 pm

Case Number: CSM-07-821162

Filing Date: May-27-2008 3:23

Juke Box: 001 Image: 02135500

DECISION ON SMALL CLAIMS TRIAL DE NOVO

BALSAM, DANIEL L. VS WORLD AVENUE U.S.A. LLC (FORMERLY NIUTECH LLC)

001C02135500

Instructions:

Please place this sheet on top of the document to be scanned.

IMAGED
MAY 28 2008

FILED
San Francisco County Superior Court
MAY 27 2008
GORDON PARK III, Clerk
Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

DANIEL L. BALSAM,
Plaintiff,

vs.

WORLD AVENUE U.S.A., LLC, a
Delaware Limited Liability Company
(formerly Niutech LLC),
Defendants.

Case No. CSM-07-0821162

DECISION ON SMALL CLAIMS
TRIAL DE NOVO

On February 5, 2008 plaintiff obtained a Small Claims judgment of \$500 plus costs against defendant. Defendant timely filed a request for trial de novo. The matter was assigned to the Honorable Mary E. Wiss presiding in Department 504. Plaintiff Daniel L. Balsam appeared by Timothy Walton of Walton & Roess LLP. Defendant World Avenue U.S.A., LLC appeared by Ira P. Rothken of Rothken Law Firm LLP. Trial proceeded on May 1, 2008, witnesses were called and exhibits received. The matter was argued on May 6, 2008 and submitted on that date. The court finds in favor of plaintiff for the reasons set forth below.

1 **1. Factual and Procedural History.**

2 Plaintiff testified that he received 15 commercial electronic mail messages (“emails”)
3 from defendant during the period May 20, 2005 to September 22, 2005. The emails were sent to
4 plaintiff’s email account through his IP server and were downloaded into plaintiff’s Inbox and
5 Spam folders. Plaintiff testified he clicked through the emails and found that they were
6 unsolicited commercial emails. On October 31, 2005 plaintiff wrote to defendant, on behalf of
7 himself and all others in California, and citing the California Legal Remedies Act (CLRA), Civil
8 Code section 1750 et seq., demanded that defendant desist from sending unsolicited commercial
9 emails. (Exhibit 101.) Plaintiff commenced suit in the Small Claims Division of this Court on
10 April 25, 2007 seeking damages and injunctive relief. The Small Claims hearing resulted in a
11 judgment for plaintiff in the amount of \$500.
12

13 **2. Contentions of the Parties.**

14 Plaintiff claims that the unsolicited commercial emails violate California Business and
15 Professions Code section 17529.5 and the California Legal Remedies Act because the subject
16 lines of the emails are misleading, the emails fail to identify the sender’s or advertiser’s name,
17 and/or contain misleading statements in the body of the emails.
18

19 Defendant raises a number of defenses. Defendant claims that under CLRA, plaintiff was
20 not damaged because there was no actual damage and no injury. Defendant further claims that
21 plaintiff’s 30-day notice was invalid because plaintiff failed to provide his email address and
22 failed to attach copies of the emails so that defendant was prevented from investigating the
23 subject of the 30-day notice letter, thus frustrating the purpose of the CLRA which is to allow a
24 defendant to rectify an unfair or unlawful practice.
25
26
27

1 Defendant asserts that the federal Controlling the Assault of Non-Solicited Pornography
2 and Marketing Act of 2003 ("CAN-SPAM") found at 15 U.S.C. §7701, et seq., preempts Bus. &
3 Prof. C. §17529.5, except for claims in violation of state law prohibiting falsity or deception.
4

5 Defendant also claims that plaintiff is time barred because plaintiff seeks liquidated
6 damages of \$1,000 per email which constitutes a penalty governed by the one year statute of
7 limitations set forth in California Code of Civil Procedure section 340(a).

8 Moreover, defendant contends that it prepared marketing or advertising copy but did not
9 send the emails. Instead, defendant has contracts with "affiliates" or third party entities which
10 purchase the advertising copy and then promote and disseminate the advertising through emails.
11 Defendant contends that its agreement with its affiliates provides that the affiliates must comply
12 with all applicable law and that if there is a violation of §17529.5 or the CLRA, it is not at fault.
13

14 **3. Defendant Is Not Liable Under the CLRA.**

15 Plaintiff testified that when he opened his email Inbox folder and Spam folder he found
16 the 15 unsolicited commercial emails from defendant. The emails can be characterized as
17 promotions for such things as baby goods, soft drinks, chocolate and other items. Plaintiff did
18 not do anything further with regard to the 15 emails, did not attempt to engage in or enter the
19 promotions, and did not click through to any of the web addresses on any of the promotions.
20 Plaintiff noted the unsolicited emails and later wrote a 30-day notice to desist to defendant
21 pursuant to the CLRA.
22

23 The Consumer Legal Remedies Act (Civil Code §1750 et seq.) is designed to protect
24 consumers against unfair and deceptive business practices. Under §1761(d) of the CLRA,
25 "[c]onsumer means an individual who seeks or acquires, by purchase or lease, any goods or
26 services for personal, family or household purposes." In the facts before this court, plaintiff
27

1 does not meet the definition of a consumer because he did not seek to or acquire by purchase or
 2 lease any goods or services. By his own testimony, plaintiff clicked through the emails, did not
 3 seek goods or services, and did not take any steps to acquire goods or services as a result of the
 4 emails. Thus, plaintiff does not have standing in this case to pursue a remedy under the
 5 Consumer Legal Remedies Act. Accordingly, the court need not address defendant's remaining
 6 arguments regarding the applicability of the CLRA.
 7

8 **4. Violation of Bus. & Prof. C. §17529.5.**

9 Defendant's representative testified that it contracts with various companies to promote
 10 products. Defendant prepares advertising and promotional material for email distribution. This
 11 advertising copy, created by defendant, includes the text contained in the body of the email and
 12 an approved subject line. Defendant enters into contracts with affiliates which distribute the
 13 promotions via email. Affiliates download the advertising copy and subject lines from
 14 defendant and send the emails. Recipients of the emails can respond to the promotions and
 15 obtain goods. Defendant's representative testified that defendant distributes millions of dollars
 16 of products to consumers who respond to the emails.
 17

18 **4(A). California Bus. & Prof. C. §17529.5 Is Preempted in Part.**

19 The initial question for the court is whether California Business & Professions Code
 20 17529.5 is preempted by the federal CAN-SPAM Act (15 U.S.C. 7701, et seq).
 21

22 Bus. & Prof. C. §17529.5 provides:

23 (a) It is unlawful for any person or entity to advertise in a commercial email
 24 advertise in a commercial e-mail advertisement either sent from California or sent to a
 25 California electronic mail address under any of the following circumstances:

- 26 (1) The e-mail advertisement contains or is accompanied by a third-
 27 party's domain name without the permission of the third party.
- (2) The e-mail advertisement contains or is accompanied by falsified,
 misrepresented, or forged header information. This paragraph does not apply to

1 truthful information used by a third party who has been lawfully authorized by the
2 advertiser to use that information.

3 (3) The e-mail advertisement has a subject line that a person knows would
4 be likely to mislead a recipient, acting reasonably under the circumstances, about
5 a material fact regarding the contents or subject matter of the message.

6 Section (a)(1) is not at issue here because plaintiff does not contend, and there was no
7 evidence adduced at trial, that the email advertisements contain or are accompanied by a third-
8 party's domain name without the permission of the third party.

9 Section (a)(2) is relevant because plaintiff claims that the emails here contain
10 misrepresented header information.

11 Section (a)(3) is also relevant in that plaintiff claims the advertisement has a subject line
12 that a person knows would be likely to mislead a recipient, acting reasonably under the
13 circumstances, about a material fact regarding the contents of the subject matter of the message.

14 The CAN-SPAM Act provides in §7707(b) "[t]his chapter supersedes any statute,
15 regulation, or rule of a State . . . that expressly regulates the use of electronic mail to send
16 commercial messages, except to the extent that any such statute, regulation, or rule prohibits
17 falsity or deception in any portion of a commercial electronic mail message or information
18 attached thereto." Thus, a state statute survives preemption only to the extent it prohibits falsity
19 or deception. Falsity and deception are not defined in CAN-SPAM. Two cases in particular are
20 instructive in analyzing the whether plaintiffs claims are preempted in this case.

21 In *Omega WorldTravel, Inc. v. Mummagraphics, Inc.* (4th Cir. 2006) 469 F.3d 348 the
22 Fourth Circuit analyzed the Oklahoma anti-span law. The Oklahoma statute made it unlawful
23 for a person to initiate an email message that the sender knows or has reason to know (1)
24 misrepresents any information in identifying the point of origin or the transmission path of the
25 email; (2) does not contain information identifying the point of origin or the transmission path of
26
27

1 the email; or (3) contains false, malicious, or misleading information which purposefully or
2 negligently injures a person.

3 The Fourth Circuit held that this statute was preempted by the federal CAN-SPAM Act
4 because it was expanded liability to situations which reached beyond common law fraud and
5 deceit. The statute is not limited to inaccuracies in transmission of information that were
6 material, led to detrimental reliance by the recipient, or were made by a sender who intended
7 that the misstatements be acted upon and either knew them to be inaccurate or was reckless
8 about the truth. (*Id.* at p. 354.)

9
10 It held that “deception” requires more than “bare error” and “falsity” can be used to
11 convey an element of tortiousness or wrongfulness. The court looked to the findings enacted in
12 the CAN-SPAM Act which make it clear that Congress saw commercial email as presenting
13 both benefits and burdens. Thus, the Fourth Circuit held that the Act does not ban all
14 commercial emails nor does it impose strict liability for insignificant errors. Congress targeted
15 only emails containing something more than an isolated error. (*Id.* at p. 354-355.)

16
17 The Fourth Circuit held that the Oklahoma statute was preempted because it effectively
18 imposed a strict liability standard to all commercial email. Because it would be impossible for
19 an email sender to exclude Oklahoma recipients, the effect of the Oklahoma statute would be
20 that commercial email senders would be held to a strict liability standard. The strict liability
21 standard imposed by Oklahoma would become a de facto national standard even though the Act
22 indicates a less demanding standard would best balance the competing interests at stake. (*Id.* at
23 p. 356.)

24
25 In *Kleffman v. Vonage Holdings Corp.* (C.D.Cal.2007) 2007 U.S. Dist. LEXIS 40487 the
26 court concluded that CAN-SPAM preempts all state statutes that regulate commercial email
27

1 except those that violate traditional fraud and deception. In *Kleffman* the plaintiff alleged he
2 received emails which violated §17529.5 because the headers falsely implied that they
3 originated from different sources. The court rejected this claim on the ground that §17529.5
4 does not prohibit the use of multiple email address and/or domain names for the sole purpose of
5 bypassing spam-filters and blacklists. Moreover, even if it did, the claim would be preempted
6 by the CAN-SPAM Act because it is not based on traditional tort theory.
7

8 This court agrees with the analyses set forth in *Omega* and *Kleffman*. Section
9 17529.5(a)(2) imposes strict liability for false, misrepresented or forged header information.
10 Thus, the court finds that plaintiff's claims that the headers contain misrepresentations in
11 violation of 17529.5(a)(2) are preempted by the CAN-SPAM Act.
12

13 Section 17529.5(a)(3) prohibits email advertisements which have a subject line that a
14 person knows would be likely to mislead a recipient, acting reasonably under the circumstances,
15 about a material fact regarding the contents or subject matter of the message. The court finds
16 that subdivision (a)(3) is not preempted because it requires knowledge and proof of a material
17 misrepresentation.
18

19 **4(B) Liability of Defendant Under Section 17259.5(a)(3).**

20 Defendant claims that it is not liable under §17529.5(a)(3) because it did not send any of
21 the 15 emails in question. However, the plain language of §17529.5 does not require plaintiff to
22 show that defendant sent the emails. Instead, it requires plaintiff to show that defendant
23 advertised in a commercial email advertisement. Defendant does not dispute that it was the
24 author of the advertisements included in the 15 advertisements at issue in this case. Thus, it
25 advertised in a commercial email advertisement.
26
27

1 Defendant further contends that §17529.5 conflicts with CAN-SPAN based upon 15
2 U.S.C. 7705. Defendant's reliance of section 7705 is misplaced. That section protects the
3 provider of the product being promoted (e.g. in this instance Hershey's, Pepsi, etc.), not
4 defendant.
5

6 Thus, the question is whether any of the e-mail advertisements "have a subject line that a
7 person knows would be likely to mislead a recipient, acting reasonably under the circumstances,
8 about a material fact regarding the contents or subject matter of the message" in violation of
9 §17529.5(a)(3).
10

11 Five of the 15 emails have subject lines that mislead a recipient:

12 Exhibit 105 contains the subject line "Pepsi* or Coke*? – Receive \$100 in gifts by
13 joining our name brand cola survey?" However, the content of the email states "Receipt of your
14 item requires compliance with offer terms, including: age and residency requirements;
15 registration with valid email address, shipping address and contact phone number; completion of
16 user survey and sponsor promotions."
17

18 Exhibit 107 contains the subject line "Hershey's* vs. Ghiradelli* get \$100 in gifts by
19 taking our survey now." However, the content of the email provides "Receipt of your item
20 requires compliance with offer terms, including: age and residency requirements; registration
21 with valid email address, shipping address and contact phone number; completion of user survey
22 and sponsor promotions."
23

24 Exhibit 113 contains the subject line "Test a SONY PSP and keep it if you like it."
25 However, the content of the email provides that "receipt of the membership incentive gift
26 requires completion of offer terms, including: age and residency requirements, registration with
27 a valid email address, completion of user survey, sponsor promotions and shipping address

1 verification.” Only when all of these requirements are completed will the recipient receive the
2 “incentive gift”.

3 Exhibit 115 contains the subject line “Upgrade your kitchen with this Refrigerator on us.”
4 However, the content of the email provides “Receipt of your item requires compliance with
5 offer terms, including: age and residency requirements, registration with valid email address,
6 shipping address and contact phone number, completion of user survey and sponsor
7 promotions.”

8 Exhibit 116 contains the subject line “Complimentary \$300 Visa Gift Card Giveaway.”
9 However, the content of the email provides “Receipt of your item requires compliance with
10 offer terms, including: age and residency requirements; registration with valid email address,
11 shipping address and contact phone number; completion of user survey and sponsor
12 promotions.”

13 The court finds that these emails violate §17529.5(a)(3) because the emails have a subject
14 line that mislead a recipient, acting reasonably under the circumstances, about a material fact
15 regarding the contents or subject matter of the message, that is, that the recipient will receive
16 free products but instead the recipient is required to participate in promotions and surveys in
17 order to be eligible for the “free” products.

18
19
20
21 **4(C). Damages for Violation of Section 17529.5.**

22 Pursuant to Bus. & Prof. C. §17529.5(b)(1)(B)(ii) the court may award actual damages or
23 \$1,000 liquidated damages per email, or both. In closing argument, plaintiff purports to “elect”
24 the \$1,000 in liquidated damages. The statute does not provide that plaintiff is entitled to an
25 “election” of remedies, but rather permits the court to award actual or liquidated damages.
26
27

1 There was no evidence which supports an award of actual damages to plaintiff in this
2 case. Thus, the available remedy is the \$1,000 liquidated damages. However, the inquiry does
3 not end here.

4
5 Section 17529.5(b)(2) provides that if the court finds that the defendant “established and
6 implemented, with due care, practices and procedures reasonably designed to effectively prevent
7 unsolicited commercial e-mail advertisements that are in violation of this section, the court shall
8 reduce the liquidated damages. . . to a maximum of one hundred dollars (\$100) for each
9 unsolicited commercial email advertisement . . .”.

10 Defendant’s representative testified that defendant enters into contracts with its affiliates.
11 The contracts provide that affiliates will comply with all applicable law regarding spam. In
12 addition the contract specifically provides that the affiliate “will not send any email Ads using a
13 subject line that has not been approved by Company or Advertiser for use . . .” (Exhibit 126)
14 Defendant’s representative further testified that it provides approved subject matter lines for its
15 advertising copy. Despite the agreement, the affiliates here altered the subject lines and inserted
16 subject lines not approved by defendant.
17

18 Defendant maintains a compliance department which is charged with investigation of all
19 complaints. (Exhibit 123, 124.) Defendant responded to plaintiff’s complaint by writing to
20 plaintiff and requesting a copy of the emails . Plaintiff did not respond to the letter. Plaintiff
21 contends that he sent a copy of the emails with his October 31, 2005 letter. However, a
22 duplicate could not be produced and defendant contends it was not attached. Defendant
23 contends it was hindered in its investigation because it did not have the email. By the time
24 plaintiff filed suit on April 25, 2007, the websites were down and defendant could not
25 investigate further. Defendant’s representative testified that it has terminated affiliates for
26
27

1 violation of its policies But, there was no evidence that defendant previously terminated the
2 affiliates which sent the subject emails or had knowledge that they would violate its contract by
3 substituting non-approved subject lines in the emails.
4

5 Accordingly, the court finds that based upon the evidence produced at trial the liquidated
6 damages of \$1,000 should be reduced to \$100 per email. The court finds for plaintiff in the sum
7 of \$500.

8 **5. The Plaintiff is Not Barred by the Statute of Limitations.**

9 Defendant contends that plaintiff's action is barred because Code of Civ. Proc. 340(a)
10 provides a one year statute of limitations for:

11 (a) An action upon a statute for a penalty or forfeiture if the action is given to an
12 individual, or to an individual and the state, except if the statute imposing it prescribes a
13 different limitation.

14 No California appellate court has addressed the statute of limitations applicable to a violation of
15 §17529.5. Section, §17529.5 does not provide for a penalty or forfeiture. Rather, the court may
16 award \$1,000 liquidated damages and/or actual damages. CCP §338 provides for a three-year
17 statute of limitations for "[a]n action upon a liability created by statute, other than a penalty or
18 forfeiture. Moreover, California's unfair competition law codified in Bus. & Prof. Code
19 §17200, et seq. provides that unfair competitions shall mean . . . "untrue or misleading
20 advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of
21 Division 7 of the Business and Professions Code." Section 17529.5 is contained in that Chapter.
22 And, actions pursuant to §17200 are governed by a four year statute of limitations.
23
24
25
26
27

1 Thus, plaintiff has at least three and possibly four years from the date of the emails to
2 bring this claim. Plaintiff received his emails between May 20 and September 22, 2005 and
3 commenced his small claims action on April 25, 2007. Thus this action is timely.¹

4
5 **6. The Request for an Injunction is Denied.**

6 The request for an injunction pursuant to Civ. Code §1780(a)(2), Civ. Code §116.220(b)
7 and California Rules of Court Rule 3.1280 is denied.

8 **7. The Request for Other Relief is Denied.**

9 Plaintiff's request for attorneys fees pursuant to §17529.5(b)(1)(C), Civil Code §1780(d)
10 and Code of Civ. Proc. §116.790 is denied. The request for attorneys' loss of earnings and
11 transportation pursuant to §116.790(b) is denied.

12
13 IT IS HEREBY ORDERED that judgment be entered in favor of plaintiff in the amount
14 of \$500. Costs are awarded to plaintiff.

15
16 Dated: May 27, 2008

17 
18 Mary E. Wiss
19 Judge of the Superior Court
20
21
22
23
24
25
26

27 ¹ The court rejects plaintiff's argument that the statute of limitations is tolled because defendant continued to send unsolicited emails to plaintiff until 2007. There is no evidence that this occurred, or that any such emails violated any law.

SUPERIOR COURT OF CALIFORNIA
County of San Francisco

DANIEL L. BALSAM,

Plaintiff

Case Number: CSM-07-821162

vs.

WORLD AVENUE USA, LLC,

Defendant

CERTIFICATE OF MAILING
(CCP 1013a (4))

I, Clark Banayad, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On May 27, 2008, I served the attached **JUDGMENT** filed on May 27, 2008 by placing a copy thereof in a sealed envelope, addressed as follows:

Timothy J. Walton, Esq.
WALTON & ROESS LLP
407 S. California, Suite 8
Palo Alto, CA 94306

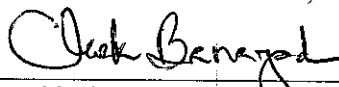
Ira P. Rothken, Esq.
ROTHKEN LAW FIRM
3 Hamilton Landing, Suite 280
Novato, CA 94949

and, I then placed the sealed envelopes in the outgoing mail at 400 McAllister Street, San Francisco, CA. 94102 on the date indicated above for collection, attachment of required prepaid postage, and mailing on that date following standard court practices.

Dated: May 27, 2008

GORDON PARK-LI, Clerk

By:



Clark Banayad, Deputy Clerk

EXHIBIT 3

World Avenue U.S.A., LLC
6001 Broken Sound Parkway, Ste. 200
Boca Raton, Florida 33487
Telephone: (561) 674-9700
Facsimile: (561) 674-9812

In Propria Personam

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO
SMALL CLAIMS DIVISION

DANIEL L. BALSAM,

Plaintiff,

vs.

WORLD AVENUE U.S.A., LLC,

Defendant.

Case No. 821162

**DEFENDANT WORLD AVENUE U.S.A.,
LLC'S TRIAL BRIEF**

Trial Date: August 31, 2007

Time: 3:30 p.m.

Dept. 506

Commissioner Paul Slavit

Action Filed: April 25, 2007

I. INTRODUCTION AND SUMMARY OF FACTS

This case is one of many brought by plaintiff Daniel Balsam, who operates a for-profit "spam" litigation business. Plaintiff currently has approximately 20 commercial email cases pending in this court, and other cases pending in other courts, including (without limitation) the Superior Courts of Santa Clara and San Francisco counties.

Plaintiff claims he received fifteen (15) emails from defendant between May and September, 2005. He did not file this claim until April 25, 2007. Plaintiff does not claim that he was actually injured or misled by any of the commercial emails that form the basis of his claims in this case, and he has presented no evidence of actual injury. In fact, plaintiff's own evidence shows that he neither "clicked through" any of the emails he received, nor attempted to obtain any offered goods or services, nor even attempted to follow the instructions contained in the emails to opt out of receiving

1 further emails. Plaintiff presented no evidence that any of the offers made in the emails at issue were
 2 false. Instead, he bases his claims on alleged technical defects in the emails' header information and
 3 insufficient and unsubstantiated allegations that the subject lines were misleading.

4 Plaintiff's claims in this case are merely an attempt to profit from a strategy of serial litigation
 5 against commercial email providers, without proof of any actual fraud, deception or injury. (See
 6 Declaration of Jeff Richard ("Richard Decl."), ¶ 5-7, filed contemporaneously with this Trial Brief).
 7 Plaintiff Balsam, like the plaintiffs in Gordon et al. v. Virtumundo, Inc. et al., Case No. 06-0204-
 8 JCC, (U.S. Dist.Ct., Washington, Western Dist., Seattle Div., Aug. 1, 2007) is engaged in a "spam
 9 business" involving "serial litigation" which is "ill-motivated, unreasonable and frivolous." (See
 10 Richard Decl., Exhibit A, District Court Order dated August 1, 2007). Judgment should be entered
 11 against plaintiff in this case, and defendant should be awarded its costs.

12 I. LEGAL ARGUMENT

13 A. Plaintiff Has Failed To Establish A Violation of the CLRA

14 1. Plaintiff Does Not Have Standing For His CLRA Claim Because He Sustained 15 No Damages And Never Relied On Any Alleged Misrepresentations of Defendant 16 To His Detriment (Civil Code § 1780(a))

17
 18 Plaintiff has failed to prove a claim under the California Consumer Legal Remedies Act,
 19 ("CLRA"), Civil Code § 1770 *et seq.*, because he suffered no damages or injury from the alleged
 20 conduct of World Avenue. He therefore lacks standing to bring this claim.

21 Civil Code § 1780(a), specifically limits civil actions under the CLRA to "any consumer who
 22 **suffers damage.**" (Emphasis added). Although California cases generally discuss this issue in the
 23 context of class certification, it is clear that an unaffected plaintiff, or a plaintiff who has not suffered
 24 damage or injury, cannot bring a CLRA claim. A lack of damages, and a lack of detrimental reliance
 25 on a material misrepresentation of defendant are both fatal to a CLRA claim. See *Wilens v. TD*
 26 *Waterhouse Group, Inc.*, 120 Cal.App.4th 746, 755 (2003) (necessity of damage for CLRA action;
 27 each class member must be *entitled* to damages). See also *Massachusetts Mutual Life Ins. Co. v.*
 28 *Superior Court*, 97 Cal.App.4th 1282, 1292-1293 (2002), where the court ruled that direct or indirect

1 evidence of damages and reliance on misrepresentation is required for a CLRA action: “As Mass
 2 Mutual argues, this [CC § 1780(a)] limitation on relief requires that plaintiffs in a CLRA action show
 3 not only that a defendant’s conduct was deceptive *but that the deception caused them harm.*”
 4 (Emphasis added). See also *Colgan v. Leatherman Tool Group, Inc.*, 135 Cal.App.4th 663, 695 (2006)
 5 The Colgan court emphasized that “Damages under the CLRA are a legal remedy, *intended to*
 6 *compensate those who suffer actual damage.*” (Emphasis added).

7 *Caro v. Proctor & Gamble Co.*, 18 Cal.App.4th 664, 664-668 (1993) dealt, in part, with the
 8 necessity of detrimental reliance on a misrepresentation for bringing a CLRA claim. Caro involved a
 9 CLRA alleging, in part, misrepresentations as to the “freshness” of orange juice. The court affirmed
 10 the denial of class certification, in part, because there was substantial evidence that the class
 11 representative did not believe the orange juice at issue was actually fresh. The court stated “there can
 12 be no class certification unless it is determined by the trial court that similarly situated persons have
 13 sustained damage. There can be no cognizable class unless it is first determined that members who
 14 make up the class have sustained the same or similar damage.” Caro, supra at 664. (Citations
 15 omitted).

16 Although the cases cited above deal with class certification, the principle applies to the instant
 17 case, which is not a class or representative action. Plaintiff failed to prove any actual damages as a
 18 result of the receipt of emails in this case. He never incurred any out of pocket expenses (outside of
 19 those associated with this litigation) as a result of receiving the emails. None of the emails allegedly
 20 received by plaintiff were shown to have caused the hard drive of plaintiff’s computer to crash, or
 21 adversely affect his computer’s processing power or damaged his computer system in any way.

22 At least two similar Superior Court case rulings are persuasive for the proposition that
 23 plaintiff’s CLRA claims cannot stand. See the Santa Clara Superior Court decision by the Honorable
 24 Judge Kevin E. McKenney, granting Summary Judgment in a similar case brought against
 25 defendant’s predecessor company by an associate and, on information and belief, spam litigation
 26 business partner, of plaintiff Balsam, in Walton v. Plasmanet et al., Santa Clara Superior Court, Case
 27 No. 1-04-CV-033020, Order Re: Motion For Summary Judgment or Adjudication, dated January 5,
 28 2007, at 2:1-10). (See Richards Decl., ¶ 7 and Exhibit B). In that case, summary judgment was

1 granted in defendant's favor because the plaintiff lacked standing to make CLRA claims, since he
2 failed to show damages or causation. The same principle should apply in the instant case to bar
3 plaintiff's CLRA claims.

4 Similarly, plaintiff herein, Balsam, was barred from bringing CLRA claims by the granting of
5 a demurrer in another Santa Clara Superior Court case Balsam brought against a different and non-
6 World Avenue-related defendant (in that case Balsam was represented by Timothy Walton, the
7 plaintiff in the above-cited Walton v. Plasmanet case, and, on information and belief, a participant in
8 Balsam's spam litigation business). The defendant's demurrer was granted to the CLRA claims,
9 without leave to amend, by the Honorable Judge Joseph H. Huber, because Balsam failed to
10 sufficiently allege that he suffered actual damages as a result of unlawful conduct by the defendant.
11 See Order Re: Demurrer to Second Amended Complaint, Balsam v. Expedite Media Group, Inc. et
12 al., Santa Clara Superior Court No. 1-06-CV-068304, dated July 10, 2007, at 2:6-20. (See Richard
13 Decl., ¶ 8 and Exhibit C).

14 In the instant case, there is no evidence that plaintiff ever detrimentally relied on any of the
15 emails. Plaintiff apparently never even "clicked" on any of the emails for the purpose of accepting
16 any goods or services offered in the emails; he apparently never clicked through on any of the offers
17 made in the emails, and he never accepted any of the goods or services offered. Because plaintiff
18 never suffered any damages or injury, and never detrimentally relied on any alleged
19 misrepresentations in the emails at issue, he cannot establish his claims under the CLRA.

20
21 **2. Plaintiff Cannot Establish His CLRA Claims Because He Never Tendered**
22 **A Valid Thirty Day Preliminary Notice And Demand Containing His**
23 **Email Address (Civil Code § 1782)**

24 Civil Code § 1782(a) requires, as a condition precedent to filing a CLRA claim that thirty
25 days prior to the commencement of an action, the plaintiff must:

- 26 (1) Notify the person alleged to have employed or committed methods,
27 acts, or practices declared unlawful by Section 1770 of the particular
28 alleged violations of Section 1770.
(2) Demand that the person correct, repair, replace, or otherwise rectify the
goods or services alleged to be in violation of Section 1770.

1 Strict and literal compliance with the thirty-day notice provisions is required. See *Outboard*
 2 *Marine Corp. v. Superior Court*, 52 Cal.App.3d 30, 40-41. The clear intent of the provisions is to
 3 provide and facilitate pre-complaint settlements of consumer actions wherever possible and to
 4 establish a limited period during which such settlement may be accomplished. The purpose is also to
 5 give the defendant sufficient notice of the alleged defects to permit appropriate remedial action. *Id.*
 6 Failure to provide proper and timely notice, delivered in the proper fashion, is fatal to a CLRA claim.
 7 See *Von Grabe v. Sprint PCS*, *supra* at 1304.

8 In the instant case, no valid pre-filing notice was given because plaintiff failed to prove that
 9 he provided defendant with the information necessary to take remedial action—the email addresses at
 10 which plaintiff claims to have received the emails at issue. In other words, plaintiff intentionally
 11 frustrated the purpose of the CLRA’s 30-day notice requirement so that he could bring this action.

12 Under these circumstances, plaintiff’s 30-day notice was ineffective and a sham. Plaintiff did
 13 not fulfill the letter or the spirit of the 30-day pre-filing notice requirement, and therefore cannot
 14 establish a condition precedent for his CLRA claim in this case.

15
 16 **B. Plaintiff Has Failed to Establish Sufficient “Falsity” or “Deception” to Avoid**
 17 **Federal CAN-SPAM Preemption of His California UCE Claims**

18 Plaintiff’s California UCE claims are preempted by the federal “spam” statutory scheme, the
 19 Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, 15 U.S.C. § 7701
 20 *et seq.* (“CAN-SPAM”) because plaintiff has failed to prove sufficient falsity or deception. Section
 21 7707(b) of CAN-SPAM provides:

22 (b) State law

23 (1) In general

24 This chapter supersedes any statute, regulation, or rule of a State or political
 25 subdivision of a State that expressly regulates the use of electronic mail to send
 26 commercial messages, except to the extent that any such statute, regulation, or rule
 prohibits falsity or deception in any portion of a commercial electronic mail message
 or information attached thereto.

27 CAN-SPAM expressly occupies the field regarding the regulation of email, except with
 28 respect to acts of falsity or deception. As discussed *infra*, and in the Jeff Richard’s Declaration filed

1 with this brief, plaintiff has failed to prove sufficient “falsity” or “deception” to avoid CAN-SPAM
2 preemption of his California Unsolicited Commercial E-mail (“UCE”) claims, Bus. & Prof. Code §
3 17529.5. At most, his claims constitute inadvertent error, not likely to mislead a reasonable
4 consumer.

5 An instructive and persuasive case on this issue is the recent Fourth Circuit decision, *Omega*
6 *World Travel, Inc. v. Mummagraphics, Inc.*, 469 F.3d 348 (4th Cir. 2006). (A copy of the Omega case
7 is attached as Exhibit D to the Richard Declaration, for the court’s convenience). The facts of *Omega*
8 are remarkably close to those alleged in the instant case. Mummagraphics, Inc. (“Mummagraphics”)
9 claimed damages under Oklahoma statutes in connection with unsolicited email advertising received
10 by its president, Mark Mumma.¹ Mumma claimed that the email messages contained several
11 inaccuracies. First, he claimed each message stated the recipient had subscribed to the advertiser’s
12 mailing list, but Mummagraphics had not done so. Each message included in its header multiple
13 sending domain names, including one that was not connected to any sender of the email. The
14 messages also contained in the “From:” header a defunct email address. *Omega, supra*, 469 F.3d 348.

15 Like the plaintiff in the instant case, Mumma attempted to “opt out” of receiving any further
16 emails but refused to provide his email address. Instead, he called Omega’s counsel and, when he
17 received further emails, sent him a letter (again not specifying his email address) demanding payment
18 for settlement of his claim that Omega had violated state and federal law. *Omega, supra*, 469 F.3d at
19 351.

20 Mummagraphics claimed it was entitled to damages under Oklahoma’s “spam” law which
21 prohibits email that contains “false” or “misleading” information, or that misrepresents or fails to
22 contain information identifying the point of origin or transmission path of the email. Okla.Stat. tit. 15,
23 § 776.1A. Mummagraphics also claimed Omega violated a provision requiring senders of unsolicited
24 commercial email to comply with opt-out requests. Okla.Stat.tit. 15, § 776.6E. Finally,
25 Mummagraphics claimed Omega had violated the Oklahoma Consumer Protection Act, Okla. Stat. tit.

26
27 ¹ Mummagraphics also sued under CAN-SPAM, as an Internet Access Service Provider, under 15 U.S.C. § 7706(g),
28 which creates a private right of action for providers of Internet access service. See *Omega, supra*, 469 F.3d at 357,
note 3. No CAN-SPAM claim or right of action is alleged in the instant case.

1 15, §§ 751 *et seq.* by violating Oklahoma’s email laws. See *Omega, supra*, 469 F.3d at 353, note 1.

2 The *Omega* court quickly disposed of the claims based on failure to comply with opt-out
 3 requests as clearly preempted by CAN-SPAM’s preemption provision. *Id.* *Omega* then spent more
 4 time discussing and analyzing Mummagraphics’ claims of “false” and “misleading” information,
 5 because CAN-SPAM exempts laws prohibiting falsity or deception from the reach of its preemption.
 6 In the end, *Omega* found that Mummagraphics’ claims of falsity or deception were not material, and
 7 consequently held they were preempted by CAN-SPAM. Finally, *Omega* found that Mummagraphics’
 8 claims did not support a cause of action under Oklahoma’s Consumer Protection Act. *Id.*

9 The *Omega* court decided that claims under Oklahoma statutes were preempted to the extent
 10 they applied to **immaterial** misrepresentation, and that all of the alleged falsity and misleading
 11 qualities of the emails were immaterial. *Omega, supra*, 469 F.3d at 353, 357-358. In doing so, the
 12 court analyzed the meaning of CAN-SPAM’s “falsity” or “deception” exception to federal preemption
 13 of the field of commercial email. The court held that “deception” requires more than “bare error” and
 14 that “falsity” requires “an element of tortiousness.” The court found that that the errors in the emails at
 15 issue did not constitute deception or falsity so as to allow state law claims. *Id.* at 354.

16 *Omega* found that “bare error” in emails was not sufficient to constitute “falsity” for
 17 preemption exception, and that this was supported by various sections of CAN-SPAM. For example,
 18 the portion of CAN-SPAM that establishes a civil cause of action regarding “false or misleading
 19 transmission information” prohibits only “header information that is *materially* false or *materially*
 20 misleading.” 15 U.S.C. § 7704(a)(1). *Omega* at 354. The *Omega* court discussed the reason for the
 21 requirement of materiality:

22 There are good reasons for this. Congress did not intend “falsity” to
 23 encompass bare error because such a reading would upset the Act’s
 24 careful balance between preserving a potentially useful commercial tool
 25 and preventing its abuse. The Act’s enacted findings make clear that
 26 Congress saw commercial email messages as presenting both benefits and
 27 burdens....Congress noted that states had sought to regulate commercial
 28 emails, but it found that the resulting patchwork of liability standards had
 proven ineffective....Congress implemented these findings by creating a
 national standard that would be undermined to the point of near-
 irrelevancy by Mummagraphics’ interpretation of the preemption
 clause....While Congress evidently believed that it would be undesirable

1 to make all errors in commercial emails actionable, Mummagraphics'
2 interpretation would allow states to bring about something very close to
3 that result. The ensuing consequences would undermine Congress' plain
4 intent....Because Mummagraphics' reading of the "falsity or deception"
5 exception would thus permit an exception to preemption to swallow the
6 rule and undermine the regulatory balance that Congress established,
Mummagraphics' reading of the exception is not compatible with the
structure of the CAN-SPAM act as a whole. *Omega, supra*, 469 F.3 at
355-356.

7 The *Omega* court found that imposing a "bare error" standard
8 rather than requiring *material and tortious misrepresentation*, as argued
9 by Mummagraphics and, in essence, by plaintiff here, would impose a
10 strict liability standard on email advertisers. Because it is difficult or
11 impossible to determine where an email recipient resides, such a standard
12 would become a de facto national standard, with all the burdens that
imposed, even though the CAN-SPAM act indicates that Congress
believed a less demanding standard would best balance the competing
interests at stake. *Id.* at 356.

13 By giving the federal preemption exception provision its proper limited scope, *Omega* was able
14 to avoid resolving the "difficult constitutional question concerning the compatibility of Oklahoma's
15 commercial e-mail provisions with the dormant commerce clause." *Id.* Likewise, by interpreting CAN-
16 SPAM's preemption provision in line with the *Omega* court's analysis, difficult dormant commerce
17 clause issues can be avoided in this case. If plaintiff's *de facto* broad interpretation of the exception to
18 CAN-SPAM preemption is accepted, so as to allow the kind of immaterial falsity or error alleged here
19 to be actionable under California law, it is likely that the dormant commerce clause will be violated.
20 See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

21 The *Omega* case is squarely on point with the instant case. Its thorough and persuasive analysis
22 should be adopted and applied here to defeat plaintiff's claims, because he failed to sufficiently prove
23 material "falsity" or "deception" as required to come outside of CAN-SPAM preemption.

24 As applied to this case, *Omega*'s reasoning is persuasive. It is also consistent with the
25 provisions of CAN-SPAM specifically dealing with the "prohibition of deceptive subject headings."
26 See 15 U.S.C. § 7704(a)(2). This provision expressly applies Federal Trade Commission ("FTC")
27 standards, pursuant to 15 U.S.C. § 45 to the determination of whether subject headings are materially
28 misleading to reasonable consumers. 15 U.S.C. § 45(n) requires that alleged misconduct be proven to
be "likely to cause *substantial injury* to consumers *which is not reasonably avoidable by consumers*

1 *themselves and not outweighed by countervailing benefits to consumers or to competition.*

2 (Emphases added). Case law has interpreted “deception” under FTC standards (as applicable here) to
3 require proof of three elements consistent with this provision:

4 Three elements must be demonstrated: "First, the FTC must show
5 *probable, not possible, deception* ("likely to mislead," not "tendency and capacity
6 *to mislead*"). Second, the FTC must show potential deception of "*consumers*
7 *acting reasonably in the circumstances,*" *not just any consumers*. Third, ...
8 consider[ed] as material only deceptions that are *likely to cause injury to a*
9 *reasonable relying consumer ...*" *Banga v. American Express Cards*, 2007 WL
10 474182, *3 (E.D.Cal. 2007), citing *Southwest Sunsites, Inc. v. F.T.C.*, 785 F.2d
11 1431, 1436 (9th Cir.1986) (Emphases added).

12 To the extent the “misleading subject lines” alleged by plaintiff herein do not
13 meet this high standard for deception, plaintiff’s claims are preempted by CAN-SPAM.
14 Accordingly, plaintiff’s California UCE claims should be rejected by this court.

15 **C. Plaintiff Has Failed To Prove Violations of California’s UCE.**

16 As discussed in detail in Jeff Richard’s Declaration, filed herewith, judgment
17 should also be entered against plaintiff because he failed to prove by a preponderance of
18 the evidence violations of California’s UCE in this case.

19 Bus. & Prof. Code § 17529.5 defines three actionable violations:

20 (a) It is unlawful for any person or entity to advertise in a commercial e-mail advertisement
21 either sent from California or sent to a California electronic mail address under any of the
22 following circumstances:

23 (1) The e-mail advertisement contains or is accompanied by a third-party's domain
24 name without the permission of the third party.

25 (2) The e-mail advertisement contains or is accompanied by falsified, misrepresented,
26 or forged header information. This paragraph does not apply to truthful information used by a
27 third party who has been lawfully authorized by the advertiser to use that information.

28 (3) The e-mail advertisement has a subject line that a person knows would be likely to
mislead a recipient, acting reasonably under the circumstances, about a material fact regarding
the contents or subject matter of the message.

Plaintiff failed to submit any evidence of a violation of subsection (a)(1). Plaintiff’s evidence of
violations of the other two subsections constitute, at most, evidence of “bare error,” and not of
material falsity and deception sufficient to constitute UCE violations. (See Richard’s Decl., ¶¶ 12-

19).

The Santa Clara Superior Court ruling in another case brought by plaintiff herein is persuasive against plaintiff's "multiple domain" names allegations as a basis for finding misrepresentation or falsity. Plaintiff in the instant case bases a substantial part of his California Unsolicited Commercial E-mail ("UCE") claims, Bus. & Prof. Code § 17529.5, on his argument that sending email from multiple domain names is a violation and is "deceptive." In a similar case brought by plaintiff Balsam in Santa Clara County Superior Court against a different commercial email company, the Honorable Judge Joseph H. Huber rejected this theory of liability under the UCE in his persuasive opinion, cited supra, Balsam v. Expedite Media Group, Inc. et al., Santa Clara Superior Court No. 1-06-CV-068304, dated July 10, 2007, at 1:27-28. (See Richard Decl., attached Exhibit C). Judge Huber found that California's UCE does not prohibit the use of multiple domain names, and there is nothing deceptive or unlawful about such conduct. As explained by Jeff Richard, there are substantial legitimate business reasons for using multiple domain names. (Richard's Decl., ¶ 10). Plaintiff's claims that use of multiple domain names constitute a violation of the UCE should be rejected in this case as well.

As explained in detail by Jeff Richard, and consistent with the legal argument, *supra*, plaintiff's claims of misleading subject lines, deceptive sender names, falsified sender email addresses, and false domain name header information are also without merit, and are not supported by the evidence. (Richard Decl., ¶¶ 12-19). At a minimum, the technical defects plaintiff attempts to establish should not be elevated to the tortuous falsity and deception necessary to make out a UCE claim.

II. CONCLUSION

Based on the foregoing, defendant World Avenue prays for judgment against plaintiff Balsam as follows:

1. That plaintiff take nothing by way of his claims and complaint;
2. That judgment be entered in favor of defendant World Avenue U.S.A., LLC;
3. That defendant World Avenue be awarded its costs;
4. Such other and further relief as the Court may deem just and proper.

1
2 Dated: September 20, 2007.

3
4 By:


5 
6 Jeff Richard
7 World Avenue U.S.A., LLC
8 Defendant *In Propria Personam*
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT 4

World Avenue U.S.A., LLC
6001 Broken Sound Parkway, Ste. 200
Boca Raton, Florida 33487
Telephone: (561) 674-9700
Facsimile: (561) 674-9812

In Propria Personam

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO
SMALL CLAIMS DIVISION

DANIEL L. BALSAM,

Plaintiff,

vs.

WORLD AVENUE U.S.A., LLC,

Defendant.

Case No. 821162

DECLARATION OF JEFF RICHARD IN
SUPPORT OF DEFENDANT WORLD
AVENUE U.S.A., LLC'S TRIAL BRIEF

Trial Date: August 31, 2007

Time: 3:30 p.m.

Dept. 506

Commissioner Paul Slavitt

Action Filed: April 25, 2007

I, Jeff Richard, do declare:

1. I am an employee of defendant World Avenue U.S.A., LLC ("World Avenue"). I make this declaration in support of defendant World Avenue's trial brief. All statements made herein are made on personal knowledge, except as to those statements made on information and belief, and those statements I believe to be true. If called as a witness, I could competently testify as to the matters stated herein.

2. I am employed by defendant World Avenue as a Manager of Compliance and Assessment, and have been so employed by World Avenue and its predecessor company (Niutech, LLC) since October 2004. My duties include (without limitation) monitoring, reporting and enforcing company advertising policies, including (without limitation) compliance with all

1 applicable state and federal laws. Such laws include, without limitation, the federal Controlling The
2 Assault of Non-Solicited Pornography and Marketing Act of 2003 ("CAN-SPAM"), 15 U.S.C. §
3 7701 *et seq.*

4 3. My duties as Manager of Compliance and Assessment include developing,
5 documenting and implementing policies, processes and procedures to ensure compliance with CAN-
6 SPAM and other applicable laws governing email advertising, and managing policy development
7 and compliance regarding other issues related to email advertising that impact company reputation,
8 goodwill, and customer relations and operations. I monitor company and external client compliance
9 with company policies, and manage a team of compliance associates. My duties also include
10 educating clients regarding complying with World Avenue advertising policies and complying with
11 applicable state and federal law. I am also in charge of acquiring and managing World Avenue's
12 domain name portfolio.

13 4. I am familiar with the above-captioned action, attended the hearing on this matter on
14 August 31, 2007, and have reviewed the pleadings and statements of plaintiff.

15 5. On information and belief, plaintiff Daniel Balsam is in the business of bringing
16 claims and instituting litigation against e-mail advertisers, and the instant case against defendant
17 World Avenue was brought as part of his profit-making business. On information and belief,
18 plaintiff Daniel Balsam makes claims and brings small claims and other actions against email
19 advertisers as a money-making operation, and Balsam has reaped profits in excess of \$50,000 in the
20 last year by bringing such claims, according to his own recent deposition testimony in another case
21 brought in San Francisco Superior Court (Unlimited Jurisdiction) against an email advertiser,
22 Expedite Media Group Inc. (Balsam v. Expedite Media Group, Inc. et al., Case No. CGC-05-
23 441627). Plaintiff admitted, in item 9 of the Small Claims Court Claim form that he filed to initiate
24 the instant case, that he has filed more than 12 other small claims within the last twelve (12) months
25 in California. On information and belief, plaintiff has currently at least twenty (20) such cases in this
26 court alone, as part of his for-profit email advertising litigation business. In addition, plaintiff
27 Balsam has instituted other California Superior Court email related litigation in at least San
28 Francisco Superior Court and Santa Clara Superior Court.

1 6. In my opinion, Daniel Balsam is a profit motivated “serial litigator,” in the same
2 manner as the plaintiffs whom the Honorable Judge John C. Coughenor, United States District Judge
3 of the United States District Court, Western District of Washington at Seattle, recently ordered to
4 pay defendants’ attorneys’ fees in the case of Gordon et al. v. Virtumundo, Inc. et al., Case No. 06-
5 0204-JCC, Order dated August 1, 2007 (U.S. Dist.Ct., Washington, Western Dist., Seattle Div., Aug.
6 1, 2007). (A true and correct copy of the Order is attached as Exhibit A). In that case, Judge
7 Coughenor, in discussing why he ordered plaintiffs to pay defendants’ attorneys’ fees stated:

8 “First, it is obvious that Plaintiffs are testing their luck at making their “spam business”
9 extraordinarily lucrative by seeking statutory damages through a strategy of spam collection
10 and serial litigation. Plaintiffs are parties to ten additional cases similar to the instant case in
11 the Western District of Washington alone...[.] [Citations omitted]. The Court is not merely
12 speculating on Plaintiffs’ motives or assessment of potential profits. ...Clearly, Plaintiffs are
13 assembling a litigation factory, which, if successful, could net millions of dollars in profit, at
14 least theoretically. Moreover, after assessing the utter lack of evidence going to any technical
15 impact or financial harm due to the alleged illegal spam, this Court found it significant that
16 [Plaintiff] Gordon did not seek actual damages in the instant litigation, because none exist,
17 and that he is instead seeking solely statutory damages for each e-mail sent....The Court finds
18 that Plaintiffs’ instant lawsuit is an excellent example of the ill-motivated, unreasonable, and
19 frivolous type of lawsuit that justifies an award of attorneys’ fees to Defendants under
20 *Fogerty*. The context of this litigation and the context of Plaintiffs’ overall litigation strategy,
21 involving at least a dozen federal actions, indicate that Plaintiffs are motivated by the prospect
22 of multi-million-dollar statutory damages awards in exchange for their relatively paltry spam-
23 collection and spam-litigation costs. Plaintiffs have alleged no actual damages in this action.
24 (Ex.A, Order, at 8:14-10:1).

25 Plaintiff Balsam, herein, like the plaintiffs in Gordon, supra, does not allege or seek actual
26 damages due to spam, and has presented no evidence of actual damages due to spam, “because none
27 exist.” Plaintiff Balsam, like the plaintiffs in Gordon, supra, instead seeks statutory damages for each
28 email sent as part of an overall litigation strategy involving many similar cases, which indicates that
plaintiff is motivated by large potential profits gained at relatively “paltry” spam litigation costs. In
my opinion, plaintiff in the instant case is, like the plaintiff in Gordon, supra, engaged in a “spam
business” involving “serial litigation” which is “ill-motivated, unreasonable and frivolous.”

7. Plaintiff in the instant case presented no evidence that he was misled by any of the
emails allegedly sent by defendant World Avenue, or that he “clicked through” on any of the emails,

1 purchased any products, or suffered actual damage in any way as a result of any conduct by
 2 defendant World Avenue. On information and belief, plaintiff's lack of actual damages at a
 3 minimum absolutely bars his claims under the Consumer Legal Remedies Act ("CLRA"), Civil
 4 Code § 1770 et seq.. See Civil Code § 1780(a). See also, as persuasive authority, the Santa Clara
 5 Superior Court's decision by the Honorable Judge Kevin E. McKenney, granting Summary
 6 Judgment in a similar case brought against defendant's predecessor company by an associate and, on
 7 information and belief, spam litigation business partner of plaintiff Balsam, Walton v. Plasmanet et
 8 al., Santa Clara Superior Court, Case No. 1-04-CV-033020, Order Re: Motion For Summary
 9 Judgment or Adjudication, dated January 5, 2007, at 2:1-10). (A true and attached copy of said
 10 Order is attached hereto as Exhibit B). In that case, summary judgment was granted in defendant's
 11 favor because plaintiff lacked standing to make CLRA claims, since he failed to show damages or
 12 causation. The same principle should apply in the instant case to bar plaintiff's CLRA claims.

13 8. Plaintiff Balsam was also barred from bringing CLRA claims by the granting of a
 14 demurrer in another Santa Clara Superior Court case Balsam brought against a different and non-
 15 World Avenue-related defendant (in that case Balsam was represented by Timothy Walton, the
 16 plaintiff in the above-cited Walton v. Plasmanet case, and, on information and belief, a participant in
 17 Balsam's spam litigation business). The defendant's demurrer was granted to the CLRA claims,
 18 without leave to amend, by the Honorable Judge Joseph H. Huber, because Balsam failed to
 19 sufficiently allege that he suffered actual damages as a result of unlawful conduct by the defendant.
 20 See Order Re: Demurrer to Second Amended Complaint, Balsam v. Expedite Media Group, Inc. et
 21 al., Santa Clara Superior Court No. 1-06-CV-068304, dated July 10, 2007, at 2:6-20. (A true and
 22 correct copy of said Order is attached hereto as Exhibit C).

23 9. Plaintiff in the instant case bases a substantial part of his California Unsolicited
 24 Commercial E-mail ("UCE") claims, Bus. & Prof. Code § 17529.5, on his argument that sending
 25 email from multiple domain names is a violation and is "deceptive." In a similar case brought by
 26 plaintiff Balsam in Santa Clara County Superior Court against a different commercial email
 27 company, the Honorable Judge Joseph H. Huber rejected this theory of liability under the UCE in his
 28 persuasive opinion, cited supra, Balsam v. Expedite Media Group, Inc. et al., Santa Clara Superior

1 Court No. 1-06-CV-068304, dated July 10, 2007, at 1:27-28. (See attached Exhibit C). Plaintiff's
2 claims that use of multiple domain names constitute a violation of the UCE should be rejected in this
3 case as well.

4 10. In my experience and training, there are numerous legitimate business reasons for the
5 use of multiple domain names, including (without limitation) the following:

- 6 a. Email list segmentation;
- 7 b. Consumer demographics;
- 8 c. ISP rate limitations or allowed connections;
- 9 d. Capacity to handle SMTP sessions;
- 10 e. Separate lines of business or divisions of advertisers.

11 11. Plaintiff's entire case is based on what appear to be, at worst, inadvertent and
12 insignificant error, not constituting deception or falsity, not likely to mislead a reasonable consumer,
13 and therefore not actionable under either CAN-SPAM or state law. See the recent leading case on
14 CAN-SPAM preemption, and the requirement of material falsity or deception to make a claim under
15 either CAN-SPAM or state law, *Omega World Travel, Inc. v. Mummagraphics, Inc.*, 469 F.3d 348
16 (4th Cir. 2006). (A copy of the *Omega* case is attached hereto as Exhibit D, for the court's
17 convenience). Plaintiff denies that any of the subject lines or other information contained in the body
18 or headers of the emails at issue were false, deceptive, or likely to mislead a reasonable consumer.
19 At worst, the information relied upon by plaintiff for his claims constituted non-actionable "bare
20 error." See *Omega World Travel, Inc. v. Mummagraphics, Inc.*, *supra*, 469 F.3d at 354-355.

21 12. Plaintiff's claim that subject lines in the emails at issue were misleading is without
22 legal or factual basis. World Avenue denies that the subject lines at issue were deceptive in any
23 manner. The conditions for obtaining the offers made were clearly spelled out and visible in the
24 subject lines themselves, and/or in the body of the emails. Plaintiff cites inapplicable Federal Trade
25 Commission (FTC) guidelines, designed for entirely different circumstances, to support his baseless
26 claim of misleading subject lines. If any FTC guidelines do apply, they are pursuant to 15 U.S.C. §
27 45. See CAN-SPAM, 15 U.S.C. § 7704(a)(2). 15 U.S.C. § 45(n) requires that alleged misconduct be
28 proven to be "likely to cause *substantial injury* to consumers *which is not reasonably avoidable by*

1 *consumers themselves and not outweighed by countervailing benefits to consumers or to*
2 *competition.* (Emphases added). Plaintiff's evidence utterly fails to meet this high standard by any
3 stretch of the imagination.

4 13. Plaintiff's claims in the instant case involve fifteen (15) email messages that were sent
5 between May and September 2005. By delaying filing this case until April 25, 2007, plaintiff has
6 made the obtaining of information and evidence regarding the alleged emails, necessary for the
7 defense of this case, extremely difficult, and, in some regards, impossible. Due to plaintiff's delay, it
8 is now impossible for World Avenue to determine with accuracy who or what entities initiated the
9 15 emails at issue. Many of the second level domain names used in the email messages have expired,
10 or, if currently registered, were registered by persons or entities, after expiration, who are unrelated
11 to the owners of the domain names when the emails were allegedly sent. There is no indication that
12 the IP addresses found in the emails' headers are bound to the entities who originally initiated them.
13 The URLs (links) within the emails no longer function. For all of these reasons, World Avenue
14 cannot accurately identify the parties who initiated the emails, and therefore cannot determine if
15 consent or a pre-existing or current business relationship existed between plaintiff and the initiators
16 of the emails. However, World Avenue itself maintains CAN-SPAM compliant email lists for the
17 emails it initiates, and, as a matter of practice and policy, does not itself and has not knowingly
18 initiated or sent unsolicited commercial email advertisements to recipients who have not consented
19 to receive them, or for whom no pre-existing or current business relationship exists.

20 14. World Avenue denies that it knowingly used deceptive sender names in any of the
21 emails at issue in the instant case. Plaintiff cites a "Request For Comment" ("RFC") to support his
22 argument that sender names were deceptive. An RFC is merely advisory and experimental, and is
23 not binding on Internet users or businesses.

24 15. Plaintiff's claim that five (5) of the emails at issue contained falsified sender email
25 addresses, based on his "error bounce back messages" is without legal or factual basis, and is based
26 on a misunderstanding of how email works. I reviewed each of the emails in plaintiff's Exhibit I1,
27 and determined that each of the 5 email's error messages come under three categories. The
28 categories of error messages and an explanation of their meaning, showing that they do no indicate

1 deceptive sender email addresses in the messages, include the following:

2 a. ***"Cannot append message to destination file /var/abuse/luser: error writing***
3 ***message: File too large***— This error specifies a problem writing the message received to a file.
4 There are a number of reasons for the problem, including file permissions, file size and message size
5 allowed.

6 b. ***"Sorry, I wasn't able to establish an SMTP connection. (#4.4.1) I'm not***
7 ***going to try again. Message has been in queue too long.***—This error message indicates a deferral
8 or delay (4.4.1). Example causes may be increased security by the ISP, the host not being able to
9 respond, intermittent networks errors, DNS resolution, or a variety of other reasons.

10 c. ***"Cannot append message to destination file /var/abuse/luser: cannot create***
11 ***file exclusively: No such file or directory.***— This error seems to indicate permissions problems
12 with creating the file to write the email message to.

13 Therefore, none of these error messages indicate the sending email addresses are invalid.

14 16. Plaintiff alleges that 2 emails initiated by "Etrack Media" were accompanied by email
15 headers that contained forged information, specifically involving the mail server machine name
16 "a.somespecial.com" (also known as a 3rd level domain name or host name). Plaintiff supports his
17 claim based on the publicly available "whois" database results for "somespecial.com" (the second
18 level domain name), which shows the second level domain name was purportedly suspended by the
19 Registrar of Record some 90 days prior because of incorrect contact information. In this claim, the
20 Plaintiff has failed to properly diagnose an email header and has also failed to follow through with
21 proper DNS queries to support the allegations.

22 17. Computers communicate using IP addresses, not host names or domain names.
23 Humans use host names and domains names because it is easier for computer users to remember
24 these rather than numerical IP addresses. The headers of the 2 email messages, parsed by Yahoo's
25 computer systems, were correct because Yahoo's computers are reporting the Reverse DNS records
26 (PTR) for the IP addresses 72.11.143.72 and 72.11.143.94 (IP address → Host Name resolution).

27 18. The Plaintiff is assuming that the authoritative name servers once bound to the second
28 level domain name "somespecial.com" prior to the alleged suspension, which defined the resource

1 records for Forward DNS records, or Forward Zones, such as the A, MX, NS and other resource
2 records, also defined the resource records for Reverse Zones (PTR records). This is not always true
3 in DNS and is not true in this case. Defendant World Avenue USA, LLC has provided Exhibit E
4 showing the proper DNS resource record queries that should have been conducted by the Plaintiff,
5 which clearly prove that Yahoo's email servers properly parsed the header and the Reverse Zone
6 entries for the IP addresses 72.11.143.72 and 72.11.143.94.

7 19. Plaintiff claims that several email messages were received where the recipient names
8 were Scott, John, Ken, Frank and Michael, and that this constitutes deception. Defendant World
9 Avenue denies that use of such names constitutes deception, and, if such occurred, it was done
10 inadvertently, and not knowingly. Email lists maintained by an entity contain unique email addresses,
11 and may also contain other identifying data for each unique consumer, such as First Name, Last
12 Name, Postal Addresses, Phone Number, Transaction Details and Gender. One of the most common
13 pieces of identifying data merged into commercial email messages is the First Name of the recipient,
14 used to personalize the message. The First Name of a recipient can be merged into an email message
15 in almost any location, including the header and body of an email message. Based on World Avenue
16 USA, LLC's experience in the email marketing industry and the fact we have no concrete information
17 on the identity of the initiator of the email messages, it is more likely than not errors occurred when
18 merging the First Name into the email messages. The First Names Scott, John, Ken, Frank and
19 Michael likely belonged to other email addresses maintained by the email list manager. World
20 Avenue USA, LLC does not believe the errors, if any there were, were knowing or intended to
21 mislead or deceive. In any event, such errors were not likely to mislead a reasonable consumer.

22 //

23 //

24 //

25 //

26 //

27 //

28 //

1 I declare under penalty of perjury under the laws of the State of California and the United
2 States that the foregoing is true and correct, and that, as to those matters sworn to on information and
3 belief, I believe them to be true; and that I execute this declaration in Boca Raton, Florida on
4 September 21, 2007.

5
6 By:

A handwritten signature in black ink, appearing to read "Jeff Richard", is written over a horizontal line.

Jeff Richard
Manager, Compliance and Assessment
World Avenue USA, LLC

EXHIBIT 5

Ira P. Rothken (SBN #160029)
ROTHKEN LAW FIRM LLP
3 Hamilton Landing, Suite 280
Novato, CA 94949
Telephone: (415) 924-4250
Facsimile: (415) 924-2905

Attorneys for Defendant
World Avenue U.S.A., LLC

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO
SMALL CLAIMS DIVISION

DANIEL L. BALSAM,

Plaintiff,

vs.

WORLD AVENUE U.S.A., LLC,

Defendant.

Case No. CSM-07-821162

**DEFENDANT WORLD AVENUE U.S.A.,
LLC'S SMALL CLAIMS APPEAL TRIAL
BRIEF**

Trial Date: April 10, 2008
Time: 9:00 a.m.
Dept. 525

Action Filed: April 25, 2007

I. INTRODUCTION AND SUMMARY OF FACTS

Plaintiff filed the instant action on April 25, 2007, claiming the receipt of 15 unlawful unsolicited emails from defendant between April and May 2005. Trial was held in the small claims division on August 31, 2007, and judgment for \$500 was entered for plaintiff on February 5, 2008. Defendant filed a timely Notice of Appeal, and the instant matter is set for trial *de novo* before the Superior Court on April 10, 2008.

This case is one of many brought by plaintiff Daniel Balsam, who operates a for-profit "spam" litigation business. At or about the time plaintiff filed the instant Small Claims Division case, plaintiff had approximately 20 commercial email cases pending in this court, and other cases pending in other courts, including (without limitation) the Superior Courts of Santa Clara and San Francisco

1 counties.

2 Plaintiff claims he received fifteen (15) emails from defendant between May and September,
3 2005. He did not file this claim until April 25, 2007. Plaintiff does not claim that he was actually
4 injured or misled by any of the commercial emails that form the basis of his claims in this case, and
5 he has no evidence of actual injury. In fact, plaintiff's own evidence shows that he neither "clicked
6 through" any of the emails he received, nor attempted to obtain any offered goods or services, nor
7 even attempted to follow the instructions contained in the emails to opt out of receiving further
8 emails. Plaintiff presented no evidence that any of the offers made in the emails at issue were false
9 nor did he provide legally recognizable evidence that the alleged deceptive content was created by
10 defendant World Avenue. Instead, he bases his claims on alleged technical defects in the emails'
11 header information and insufficient and unsubstantiated allegations that the subject lines were
12 misleading and then concludes in a factual void that World Avenue should be responsible. **Indeed,**
13 **the evidence will show that World Avenue did not create the alleged deceptive content nor did it**
14 **send the emails and World Avenue's terms of use actually prohibit any potential unlawful**
15 **conduct and thus World Avenue is immune from liability under the Communications Decency**
16 **Act Section 230 as the content was provided by another user of the Interactive Computer**
17 **Services email services provider.**

18 Plaintiff's claims in this case are merely an attempt to profit from a strategy of serial litigation
19 against commercial email providers, without proof of any actual fraud, deception or injury. (See
20 Declaration of Jeff Richard ("Richard Decl."), ¶ 5-7, filed Defendant's Trial Brief, a copy of which is
21 submitted herewith). Plaintiff Balsam, like the plaintiffs in Gordon et al. v. Virtumundo, Inc. et al.,
22 Case No. 06-0204-JCC, (U.S. Dist.Ct., Washington, Western Dist., Seattle Div., Aug. 1, 2007) is
23 engaged in a "spam business" involving "serial litigation" which is "ill-motivated, unreasonable and
24 frivolous." (See Richard Decl., Exhibit A, District Court Order dated August 1, 2007). Judgment
25 should be entered against plaintiff in this case, and defendant should be awarded its costs.

26 27 28 II. LEGAL ARGUMENT

1 **A. Plaintiff Cannot Establish A Violation of the CLRA**

2 **1. Plaintiff Does Not Have Standing For His CLRA Claim Because He Sustained**
 3 **No Damages And Never Relied On Any Alleged Misrepresentations of Defendant**
 4 **To His Detriment (Civil Code § 1780(a))**

5 Plaintiff's claim under the California Consumer Legal Remedies Act, ("CLRA"), Civil Code
 6 § 1770 *et seq.*, is without merit. Plaintiff cannot prove a claim under the CLRA because he suffered
 7 no damages or injury from the alleged conduct of World Avenue. He therefore lacks standing to bring
 8 this claim.

9 Civil Code § 1780(a), specifically limits civil actions under the CLRA to "any consumer who
 10 **suffers damage.**" (Emphasis added). Although California cases generally discuss this issue in the
 11 context of class certification, it is clear that an unaffected plaintiff, or a plaintiff who has not suffered
 12 damage or injury, cannot bring a CLRA claim. A lack of damages, and a lack of detrimental reliance
 13 on a material misrepresentation of defendant are both fatal to a CLRA claim. See *Wilens v. TD*
 14 *Waterhouse Group, Inc.*, 120 Cal.App.4th 746, 755 (2003) (necessity of damage for CLRA action;
 15 each class member must be *entitled* to damages). See also *Massachusetts Mutual Life Ins. Co. v.*
 16 *Superior Court*, 97 Cal.App.4th 1282, 1292-1293 (2002), where the court ruled that direct or indirect
 17 evidence of damages and reliance on misrepresentation is required for a CLRA action: "As *Mass.*
 18 *Mutual* argues, "this [CC § 1780(a)] limitation on relief requires that plaintiffs in a CLRA action
 19 show not only that a defendant's conduct was deceptive **but that the deception caused them harm.**"
 20 (Emphasis added). See also *Colgan v. Leatherman Tool Group, Inc.*, 135 Cal.App.4th 663, 695 (2006)
 21 The *Colgan* court emphasized that "Damages under the CLRA are a legal remedy, **intended to**
 22 **compensate those who suffer actual damage.**" (Emphasis added).

23 *Caro v. Proctor & Gamble Co.*, 18 Cal.App.4th 664, 664-668 (1993) dealt, in part, with the
 24 necessity of detrimental reliance on a misrepresentation for bringing a CLRA claim. *Caro* involved a
 25 CLRA claim alleging, in part, misrepresentations as to the "freshness" of orange juice. The court
 26 affirmed the denial of class certification, in part, because there was substantial evidence that the class
 27 representative did not believe the orange juice at issue was actually fresh. The court stated "there can
 28 be no class certification unless it is determined by the trial court that similarly situated persons have

1 sustained damage. There can be no cognizable class unless it is first determined that members who
2 make up the class have sustained the same or similar damage.” *Caro, supra* at 664. (Citations
3 omitted).

4 Although the cases cited above deal with class certification, the principle applies to the instant
5 case, which is not a class or representative action. Plaintiff failed to prove any actual damages as a
6 result of the receipt of emails in this case. He never incurred any out of pocket expenses (outside of
7 those associated with this litigation) as a result of receiving the emails. None of the emails allegedly
8 received by plaintiff were shown to have caused the hard drive of plaintiff’s computer to crash, or
9 adversely affect his computer’s processing power or damaged his computer system in any way.

10 At least two similar Superior Court case rulings are persuasive for the proposition that
11 plaintiff’s CLRA claims cannot stand. See the Santa Clara Superior Court decision by the Honorable
12 Judge Kevin E. McKenney, granting Summary Judgment in a similar case brought against
13 defendant’s predecessor company by an associate and, on information and belief, spam litigation
14 business partner, of plaintiff Balsam, in *Walton v. Plasmanet et al.*, Santa Clara Superior Court, Case
15 No. 1-04-CV-033020, Order Re: Motion For Summary Judgment or Adjudication, dated January 5,
16 2007, at 2:1-10). (See Richards Decl., ¶ 7 and Exhibit B). In that case, summary judgment was
17 granted in defendant’s favor because the plaintiff lacked standing to make CLRA claims, since he
18 failed to show damages or causation. The same principle should apply in the instant case to bar
19 plaintiff’s CLRA claims.

20 Similarly, plaintiff herein, Balsam, was barred from bringing CLRA claims by the granting of
21 a demurrer in another Santa Clara Superior Court case Balsam brought against a different and non-
22 World Avenue-related defendant (in that case Balsam was represented by Timothy Walton, the
23 plaintiff in the above-cited *Walton v. Plasmanet* case, and, on information and belief, a participant in
24 Balsam’s spam litigation business). The defendant’s demurrer was granted to the CLRA claims,
25 without leave to amend, by the Honorable Judge Joseph H. Huber, because Balsam failed to
26 sufficiently allege that he suffered actual damages as a result of unlawful conduct by the defendant.
27 See Order Re: Demurrer to Second Amended Complaint, *Balsam v. Expedite Media Group, Inc. et*
28 *al.*, Santa Clara Superior Court No. 1-06-CV-068304, dated July 10, 2007, at 2:6-20. (See Richard

Decl., ¶ 8 and Exhibit C).

In the instant case, there is no evidence that plaintiff ever detrimentally relied on any of the emails. Plaintiff apparently never even “clicked” on any of the emails for the purpose of accepting any goods or services offered in the emails; he apparently never clicked through on any of the offers made in the emails, and he never accepted any of the goods or services offered. Because plaintiff never suffered any damages or injury, and never detrimentally relied on any alleged misrepresentations in the emails at issue, he cannot establish his claims under the CLRA.

2. Plaintiff Cannot Establish His CLRA Claims Because He Never Tendered A Valid Thirty Day Preliminary Notice And Demand Containing His Email Address (Civil Code § 1782)

Civil Code § 1782(a) requires, as a condition precedent to filing a CLRA claim that thirty days prior to the commencement of an action, the plaintiff must:

- (1) Notify the person alleged to have employed or committed methods, acts, or practices declared unlawful by Section 1770 of the particular alleged violations of Section 1770.
- (2) Demand that the person correct, repair, replace, or otherwise rectify the goods or services alleged to be in violation of Section 1770.

Strict and literal compliance with the thirty-day notice provisions is required. See *Outboard Marine Corp. v. Superior Court*, 52 Cal.App.3d 30, 40-41. The clear intent of the provisions is to provide and facilitate pre-complaint settlements of consumer actions wherever possible and to establish a limited period during which such settlement may be accomplished. The purpose is also to give the defendant sufficient notice of the alleged defects to permit appropriate remedial action. *Id.* Failure to provide proper and timely notice, delivered in the proper fashion, is fatal to a CLRA claim. See *Von Grabe v. Sprint PCS*, *supra* at 1304.

In the instant case, no valid pre-filing notice was given because plaintiff failed to prove that he provided defendant with the information necessary to take remedial action—the email addresses at which plaintiff claims to have received the emails at issue. In other words, plaintiff intentionally frustrated the purpose of the CLRA’s 30-day notice requirement so that he could bring this action.

Under these circumstances, plaintiff’s 30-day notice was ineffective and a sham. Plaintiff did

1 not fulfill the letter or the spirit of the 30-day pre-filing notice requirement, and therefore cannot
 2 establish a condition precedent for his CLRA claim in this case.

3
 4 **B. Plaintiff's UCE Claims Are Preempted by the Federal CAN-SPAM Statute**
 5 **Because He Cannot Establish Knowledge or Tortious or Material "Falsity" or**
 6 **"Deception."**

7 Plaintiff's California Unsolicited Commercial E-mail claims ("UCE"), Bus. & Prof. Code §
 8 17529.5, are preempted by the federal "spam" statutory scheme, the Controlling the Assault of Non-
 9 Solicited Pornography and Marketing Act of 2003, 15 U.S.C. § 7701 *et seq.* ("CAN-SPAM") because
 10 plaintiff cannot prove material falsity or deception. Section 7707(b) of CAN-SPAM provides:

11 (b) State law

12 (1) In general

13 This chapter supersedes any statute, regulation, or rule of a State or political
 14 subdivision of a State that expressly regulates the use of electronic mail to send
 15 commercial messages, except to the extent that any such statute, regulation, or rule
 16 prohibits falsity or deception in any portion of a commercial electronic mail message
 17 or information attached thereto.

18 CAN-SPAM expressly occupies the field regarding the regulation of email, except with
 19 respect to acts of falsity or deception. As discussed *infra*, and in the Jeff Richard's Declaration filed
 20 with this brief, plaintiff has failed to prove sufficient knowledge or material "falsity" or "deception"
 21 to avoid CAN-SPAM preemption of his California Unsolicited Commercial E-mail ("UCE") claims,
 22 Bus. & Prof. Code § 17529.5. At most, his claims constitute inadvertent error, not likely to mislead a
 23 reasonable consumer and are not actionable against World Avenue who is immune under the Federal
 24 Communications Decency Act immunity.¹

25 ¹ In addition, since the alleged deceptive "content" was created by a third party who then forwarded it to the email
 26 list services provider in an unauthorized manner (who then sent such email via an interactive services provider or
 27 ISP) World Avenue cannot be held secondarily liable for the alleged tortious acts of a third party either under State
 28 law or under the Communications Decency Act Section 230 which immunizes "users" of an interactive service, such
 as World Avenue, from state tort liability for content provided by third parties. *Barrett v. Rosenthal*, 40 Cal. 4th 33
 (2006). *Batzel v. Smith* (9th Cir.2003) 333 F.3d 1018. Most relevant to the instant case in *Batzel* the Court declared:
 "There is no dispute that the Network uses interactive computer services to distribute its on-line mailing and to post
 the listserv on its website. Indeed, to make its website available and to mail out the listserv, the Network *must* access
 the Internet through some form of "interactive computer service." Thus, both the Network website and the listserv
 are potentially immune under § 230.... Critically, however, § 230 limits immunity to information "provided by

1
2 **1. CAN-SPAM Imposes a Knowledge Requirement, Thereby Rendering**
3 **Plaintiff's Claims under B&P Code § 17529.5 Invalid.**

4 By its title, California Business and Professions Code § 17529.5, the statute under which
5 plaintiff brings his UCE claim, seeks to regulate “[u]nlawful activities relating to commercial e-mail
6 advertisements.” However, plaintiff’s claims under B&P Code § 17529.5 are expressly limited by
7 the federal CAN-SPAM Act, 15 U.S.C. § 7701 et seq., which states:

8 This chapter supersedes any statute, regulation, or rule of a State...that expressly
9 regulates the use of electronic mail to send commercial messages, except to the extent
10 that any such statute, regulation, or rule prohibits falsity or deception in any portion of
a commercial electronic mail message or information attached thereto.

11 15 U.S.C. 7707(b).

12 Recent judicial decisions, in both federal and state courts alike, emphasize Congress’s intent
13 to draft a statute that requires a plaintiff, in order to prevail on its alleged spam action, to prove
14 knowledge of the wrongdoing by each defendant, because “strict liability standards for errors would
15 impede unique opportunities for the development and growth of frictionless commerce.” *See Omega*
16 *World Travel, Inc. et al. v. Mummagraphics, Inc. et al.*, 469 F. 3d 348, 355 (4th Cir. 2006).
17 Likewise, in rejecting plaintiffs’ arguments for strict liability in state anti-spam statutes, courts have
18 pointed out that if states were permitted to impose strict liability in these scenarios, the significant
19 variance in different states’ anti-spam statutes would cause senders to “assume that their messages
20 were governed by the most stringent state laws in effects”, thereby rendering Congress’s intent
21 meaningless. *Mummagraphics* at 355-56. Thus, California Business and Professions Code §
22 17529.5 is only valid to the extent it comports with the standards of the CAN-SPAM Act relating to
23 knowledge of the defendants and to materiality of allegedly false or deceptive portions of

24
25 another information content provider.” § 230(c)(1). An “information content provider” is defined by the statute to
26 mean “any person or entity that is responsible, in whole or in part, for the creation or development of information
27 provided through the Internet or any other interactive computer service.” § 230(f)(3). The reference to “another
28 information content provider” (emphasis added) distinguishes the circumstance in which the interactive computer
service itself meets the definition of “information content provider” with respect to the information in question. The
pertinent question therefore becomes whether Smith was the sole content provider of his e-mail, or whether Cremers
can also be considered to have “creat[ed]” or “develop[ed]” Smith’s e-mail message forwarded to the listserv.^{FN17}

commercial emails.

Specifically, in *Mummagraphics*, the Fourth Circuit Court of Appeals held that an Oklahoma statute, similar to the California one at issue, was preempted to the extent that the statute did not require a plaintiff to prove knowledge by the defendant of wrongdoing related to the alleged spam email. “The strict liability standard imposed by a state such as Oklahoma would become a de facto national standard, with all the burdens that imposed.” *Id.* at 356. *Mummagraphics* thus “stands for the...proposition[] that...the CAN-SPAM preemption clause *does not allow states to create strict liability for inaccuracies in commercial email.*” See *Kleffman v. Vonage Holdings Corp.*, 2007 WL 1518650 (C.D. Cal. 2007) (finding that plaintiff’s claims under Cal. B&P Code § 17529.5 were preempted). (Emphasis added). Here, plaintiff has not alleged, nor can he prove or in good faith allege, that defendants had knowledge of any allegedly misleading statements in commercial emails.

2. Plaintiff’s Cannot Prove Tortious Falsity or Deception As He Must to Avoid CAN-SPAM Preemption

In the saving clause of CAN-SPAM’s preemption section, Congress allowed states to prohibit “falsity or deception in any portion of a commercial email message or information attached thereto.” 15 U.S.C. § 7704(a). However, this savings clause only allows states to extend their traditional fraud prohibitions to the realm of commercial emails.¹ *Kleffman v. Vonage Holdings Corp.*, *supra* at *3. In the *Kleffman* case, the court cites to California case law that delineates the elements of fraud and deceit, as examples of traditional tort theories that plaintiffs could use to allege falsity and deception in commercial emails. *Id.* *Kleffman* holds that CAN-SPAM “left states room only to extend their *traditional* fraud prohibitions to the realm of commercial emails.” *Id.* (Emphasis in the original).

¹ The elements of fraud are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or ‘scienter’); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage. To establish a claim for deceit based on intentional misrepresentation, the plaintiff must prove seven essential elements: (1) the defendant represented to the plaintiff that an important fact was true; (2) that representation was false; (3) the defendant knew that the representation was false when the defendant made it, or the defendant made the representation recklessly and without regard for its truth; (4) the defendant intended that the plaintiff rely on the representation; (5) the plaintiff reasonably relied on the representation; (6) the plaintiff was harmed; and (7) the plaintiff’s reliance on the defendant’s representation was a substantial factor in causing that harm to the plaintiff. *Kleffman* at *3 (citing *Manderville v. PCG & S Group, Inc.*, 146 Cal.App.4th 1486, 1498 (Ct. App. 2007)).

1 In the present case, plaintiff does not have evidence related to most of the elements of the
 2 claims of fraud or deceit. Specifically, plaintiff cannot show evidence of the intent to defraud,
 3 justifiable reliance by plaintiff or damage resulting from justifiable reliance on any
 4 misrepresentation. Indeed, plaintiff was not even misled. As a result, plaintiff cannot present
 5 evidence sufficient to support a cause of action under B&P Code § 17529.5.
 6

7 **3. CAN-SPAM Imposes a Materiality Requirement, Which Plaintiff Cannot**
 8 **Meet, Rendering His Claims under B&P Code § 17529.5 Invalid.**

9 Plaintiff's claims of UCE violation appears to boil down to his arguments (a) that the emails
 10 are misleading because they claim to provide free goods, and (b) that that the use of multiple
 11 domain names is *per se* unlawful because it allows a sender to evade spam filters. Neither of these
 12 claims have merit.

13 Bus. & Prof. Code § 17529.5 defines three actionable violations:

14 (a) It is unlawful for any person or entity to advertise in a commercial e-mail advertisement
 15 either sent from California or sent to a California electronic mail address under any of the
 16 following circumstances:

17 (1) The e-mail advertisement contains or is accompanied by a third-party's domain
 18 name without the permission of the third party.

19 (2) The e-mail advertisement contains or is accompanied by falsified, misrepresented,
 20 or forged header information. This paragraph does not apply to truthful information used by a
 21 third party who has been lawfully authorized by the advertiser to use that information.

22 (3) The e-mail advertisement has a subject line that a person knows would be likely to
 23 mislead a recipient, acting reasonably under the circumstances, about a material fact regarding
 24 the contents or subject matter of the message.

25 Plaintiff has no evidence of a violation of subsection (a)(1). Plaintiff's evidence of violations of the
 26 other two subsections constitute, at most, evidence of "bare error," and not of material falsity and
 27 deception sufficient to constitute UCE violations. (See Richard's Decl., ¶¶ 12-19).

28 *Omega World Travel, Inc. v. Mummagraphics, Inc.*, 469 F.3d 348 (4th Cir. 2006) is instructive
 on the requirement that alleged falsity or deception must be material and tortious to avoid CAN-
 SPAM preemption. (A copy of the Omega case is attached as Exhibit D to the Richard Declaration,
 for the court's convenience). The facts of *Omega* are remarkably close to those alleged in the instant
 case. Mummagraphics, Inc. ("Mummagraphics") claimed damages under Oklahoma statutes in

1 connection with unsolicited email advertising received by its president, Mark Mumma.¹ Mumma
2 claimed that the email messages contained several inaccuracies. First, he claimed each message stated
3 the recipient had subscribed to the advertiser's mailing list, but Mummagraphics had not done so.
4 Each message included in its header multiple sending domain names, including one that was not
5 connected to any sender of the email. The messages also contained in the "From:" header a defunct
6 email address. *Omega, supra*, 469 F.3d 348.

7 Like the plaintiff in the instant case, Mumma attempted to "opt out" of receiving any further
8 emails but refused to provide his email address. Instead, he called Omega's counsel and, when he
9 received further emails, sent him a letter (again not specifying his email address) demanding payment
10 for settlement of his claim that Omega had violated state and federal law. *Omega, supra*, 469 F.3d at
11 351.

12 Mummagraphics claimed it was entitled to damages under Oklahoma's "spam" law which
13 prohibits email that contains "false" or "misleading" information, or that misrepresents or fails to
14 contain information identifying the point of origin or transmission path of the email. Okla.Stat. tit. 15,
15 § 776.1A. Mummagraphics also claimed Omega violated a provision requiring senders of unsolicited
16 commercial email to comply with opt-out requests. Okla.Stat.tit. 15, § 776.6E. Finally,
17 Mummagraphics claimed Omega had violated the Oklahoma Consumer Protection Act, Okla. Stat. tit.
18 15, §§ 751 *et seq.* by violating Oklahoma's email laws. See *Omega, supra*, 469 F.3d at 353, note 1.

19 The *Omega* court quickly disposed of the claims based on failure to comply with opt-out
20 requests as clearly preempted by CAN-SPAM's preemption provision. *Id. Omega* then spent more
21 time discussing and analyzing Mummagraphics' claims of "false" and "misleading" information,
22 because CAN-SPAM exempts laws prohibiting falsity or deception from the reach of its preemption.
23 In the end, *Omega* found that Mummagraphics' claims of falsity or deception were not material, and
24 consequently held they were preempted by CAN-SPAM. Finally, *Omega* found that Mummagraphics'
25 claims did not support a cause of action under Oklahoma's Consumer Protection Act, a law that is
26

27 ¹ Mummagraphics also sued under CAN-SPAM, as an Internet Access Service Provider, under 15 U.S.C. § 7706(g),
28 which creates a private right of action for providers of Internet access service. See *Omega, supra*, 469 F.3d at 357,
note 3. No CAN-SPAM claim or right of action is alleged in the instant case.

1 similar to California's UCE. *Id.*

2 The *Omega* court decided that claims under Oklahoma statutes were preempted to the extent
3 they applied to **immaterial** misrepresentation, and that all of the alleged falsity and misleading
4 qualities of the emails were immaterial. *Omega, supra*, 469 F.3d at 353, 357-358. In doing so, the
5 court analyzed the meaning of CAN-SPAM's "falsity" or "deception" exception to federal preemption
6 of the field of commercial email. The court held that "deception" requires **more than "bare error"**
7 and that "falsity" requires **"an element of tortiousness."** The court found that the errors in the
8 emails at issue did not constitute deception or falsity so as to evade CAN-SPAM preemption and
9 permit state law claims. *Id.* at 354.

10 *Omega* found that "bare error" in emails was not sufficient to constitute "falsity" for
11 preemption exception, and that this was supported by various sections of CAN-SPAM. For example,
12 the portion of CAN-SPAM that establishes a civil cause of action regarding "false or misleading
13 transmission information" prohibits only "header information that is *materially* false or *materially*
14 misleading." 15 U.S.C. § 7704(a)(1). *Omega* at 354. The *Omega* court discussed the reason for the
15 requirement of materiality:

16
17 There are good reasons for this. Congress did not intend "falsity" to
18 encompass bare error because such a reading would upset the Act's careful
19 balance between preserving a potentially useful commercial tool and
20 preventing its abuse. The Act's enacted findings make clear that Congress
21 saw commercial email messages as presenting both benefits and
22 burdens....Congress noted that states had sought to regulate commercial
23 emails, but it found that the resulting patchwork of liability standards had
24 proven ineffective....Congress implemented these findings by creating a
25 national standard that would be undermined to the point of near-
26 irrelevancy by Mummagraphics' interpretation of the preemption
27 clause....While Congress evidently believed that it would be undesirable
28 to make all errors in commercial emails actionable, Mummagraphics'
interpretation would allow states to bring about something very close to
that result. The ensuing consequences would undermine Congress' plain
intent....Because Mummagraphics' reading of the "falsity or deception"
exception would thus permit an exception to preemption to swallow the
rule and undermine the regulatory balance that Congress established,
Mummagraphics' reading of the exception is not compatible with the
structure of the CAN-SPAM act as a whole. *Omega, supra*, 469 F.3 at
355-356.

1 The *Omega* court found that imposing a “bare error” standard
 2 rather than requiring *material and tortious misrepresentation*, as argued by
 3 Mummagraphics and, in essence, by plaintiff here, would impose a strict
 4 liability standard on email advertisers. Because it is difficult or impossible
 5 to determine where an email recipient resides, such a standard would
 6 become a de facto national standard, with all the burdens that imposed,
 even though the CAN-SPAM act indicates that Congress believed a less
 demanding standard would best balance the competing interests at stake.
Id. at 356.

7 By giving the federal preemption exception provision its proper limited scope, *Omega* was able
 8 to avoid resolving the “difficult constitutional question concerning the compatibility of Oklahoma’s
 9 commercial e-mail provisions with the dormant commerce clause.” *Id.* Likewise, by interpreting CAN-
 10 SPAM’s preemption provision in line with the *Omega* court’s analysis, difficult dormant commerce
 11 clause issues can be avoided in this case. If plaintiff’s *de facto* broad interpretation of the exception to
 12 CAN-SPAM preemption is accepted, so as to allow the kind of immaterial falsity or error alleged here
 13 to be actionable under California law, it is likely that the dormant commerce clause will be violated.
 14 See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

15 The *Omega* case is squarely on point with the instant case. Its thorough and persuasive analysis
 16 should be adopted and applied here to defeat plaintiff’s claims, because he cannot prove material
 17 “falsity” or “deception” as required to come outside of CAN-SPAM preemption.

18 *Omega*’s reasoning should also be applied in the instant case because it is consistent with the
 19 provisions of CAN-SPAM specifically dealing with the “prohibition of deceptive subject headings.”
 20 See 15 U.S.C. § 7704(a)(2). This provision expressly applies Federal Trade Commission (“FTC”)
 21 standards, pursuant to 15 U.S.C. § 45 to the determination of whether subject headings are materially
 22 misleading to reasonable consumers. 15 U.S.C. § 45(n) requires that alleged misconduct be proven to
 23 be “likely to cause *substantial injury* to consumers *which is not reasonably avoidable by consumers*
 24 *themselves and not outweighed by countervailing benefits to consumers or to competition.*
 25 (Emphases added). Case law has interpreted “deception” under FTC standards (as applicable here) to
 26 require proof of three elements consistent with this provision:

27 Three elements must be demonstrated: “First, the FTC must show
 28 ***probable, not possible, deception*** (“likely to mislead,” not “tendency and capacity
 to mislead”). Second, the FTC must show potential deception of “***consumers***

1 *acting reasonably in the circumstances," not just any consumers.* Third, ...
 2 consider[ed] as material only deceptions that are *likely to cause injury to a*
 3 *reasonable relying consumer ...*" *Banga v. American Express Cards*, 2007 WL
 4 474182, *3 (E.D.Cal. 2007), citing *Southwest Sunsites, Inc. v. F.T.C.*, 785 F.2d
 5 1431, 1436 (9th Cir.1986) (Emphases added).

6 To the extent the "misleading subject lines" alleged by plaintiff herein do not meet this high
 7 standard for deception, plaintiff's claims are preempted by CAN-SPAM. Accordingly, plaintiff's
 8 California UCE claims should be rejected by this court. See also *Gordon v. Virtumundo, Inc.*, 2007
 9 WL 1459395 (Wash. 2007)(holding, in pertinent part, that plaintiff's claims under Washington state
 10 statute preempted by CAN-SPAM).

11 With respect to plaintiff's argument that the use of multiple domain names is unlawful, the
 12 court in *Kleffman, supra*, clearly rejects this theory of liability, explaining, "if the legislature had
 13 intended to draft legislation requiring the adoption of procedures that would allow for the effective
 14 operation of spam filters, it surely could have said so in plain English." *Id.* at *2. Accordingly, the
 15 use of multiple domain names "created for the sole purpose of by-passing spam-filters and
 16 blacklists" is not actionable under California law. *Id.*

17 The Santa Clara Superior Court's ruling in another case brought by plaintiff herein is also
 18 persuasive authority against plaintiff's theory that "multiple domain" names allegations provide a
 19 basis for finding misrepresentation or falsity. In a similar case brought by plaintiff Balsam in Santa
 20 Clara County Superior Court against a different commercial email company, the Honorable Judge
 21 Joseph H. Huber rejected this theory of liability under the UCE in *Balsam v. Expedite Media Group,*
 22 *Inc. et al.*, Santa Clara Superior Court No. 1-06-CV-068304, dated July 10, 2007, at 1:27-28. (See
 23 Richard Decl., attached Exhibit C). Judge Huber found that California's UCE does not prohibit the
 24 use of multiple domain names, and there is nothing deceptive or unlawful about such conduct. As
 25 explained by Jeff Richard, there are substantial legitimate business reasons for using multiple domain
 26 names. (Richard's Decl., ¶ 10). Plaintiff's claims that use of multiple domain names constitute a
 27 violation of the UCE should be rejected in this case as well.

28 As explained in detail by Jeff Richard, and consistent with the legal argument, *supra*,
 plaintiff's claims of misleading subject lines, deceptive sender names, falsified sender email
 addresses, and false domain name header information are also without merit, and are not supported by

1 the evidence. (Richard Decl., ¶¶ 12-19). At a minimum, the technical defects plaintiff attempts to
 2 establish should not be elevated to the tortuous falsity and deception necessary to make out a UCE
 3 claim.

4 Plaintiff has had no difficulty following links in the emails and using reverse-look-up to
 5 identify the defendant herein. Likewise, the allegedly misleading “free” offers are preceded by
 6 clearly delineated terms and conditions, and thus cannot be deemed misleading, let alone materially
 7 so. Under CAN-SPAM, therefore, the emails would not be materially “false or deceptive” vis-à-vis
 8 defendants, and Plaintiff’s B&P Code § 17529.5 claims are preempted by CAN-SPAM.

9 The above is also consistent with the provisions of CAN-SPAM specifically dealing with the
 10 “prohibition of deceptive subject headings.” See 15 U.S.C. § 7704(a)(2). This provision expressly
 11 applies Federal Trade Commission (“FTC”) standards, pursuant to 15 U.S.C. § 45 to the determination
 12 of whether subject headings are materially misleading to reasonable consumers. 15 U.S.C. § 45(n)
 13 requires that alleged misconduct be proven to be “likely to cause *substantial injury* to consumers
 14 *which is not reasonably avoidable by consumers themselves and not outweighed by countervailing*
 15 *benefits to consumers or to competition*. (Emphasis added). Case law has interpreted “deception”
 16 under FTC standards (as applicable here) to require proof of three elements consistent with this
 17 provision:

18
 19 Three elements must be demonstrated: “First, the FTC must show
 20 *probable, not possible, deception* (“likely to mislead,” not “tendency and capacity
 21 to mislead”). Second, the FTC must show potential deception of “*consumers*
 22 *acting reasonably in the circumstances,*” *not just any consumers*. Third, ...
 23 consider[ed] as material only deceptions that are *likely to cause injury to a*
 24 *reasonable relying consumer ...*” *Banga v. American Express Cards*, 2007 WL
 25 474182, *3 (E.D.Cal. 2007), citing *Southwest Sunsites, Inc. v. F.T.C.*, 785 F.2d
 26 1431, 1436 (9th Cir.1986) (Emphases added).

27 Plaintiff Balsam has not met, and cannot meet, this burden of proof.

28 C. Plaintiff’s Complaint Should Be Dismissed Because It Does Not Belong In Small Claims Court.

Judgment should also be entered against plaintiff and in favor of defendant because

1 plaintiff's complaint does not belong in small claims court. Plaintiff's complaint involves complex
 2 and novel issues of fact and law, a penal claim rather than a claim for damages or "recovery of
 3 money," and issues of federal preemption and other matters pertaining to federal law. The small
 4 claims division is not a proper forum for this case.

5 **1. The Small Claims Court Is Not a Proper Forum for this Case**

6 The small claims court has jurisdiction only over actions for the "recovery of money," such
 7 as on contract or tort claims. *See Leuschen v. Small Claims Court*, 191 Cal. 133, (1923); *In re*
 8 *Marriage of Lackey*, 143 Cal. App. 3d 698, 704 (1983) (dismissing action in small claims court
 9 because it was not a claim for money owed or based on contract or tort theories of recovery). In this
 10 case, plaintiff is not seeking the "recovery" of any money. Instead, he is seeking to enforce a
 11 **statutory penalty**. While small claims jurisdiction extends to both contract and tort claims, it was
 12 not intended to encompass statutory penalty claims as those alleged in this matter. *See In re*
 13 *Marriage of Lackey, supra.* .

14 Business and Professions Code Section 17529.5(b)(1)(B) states that any person eligible to
 15 bring suit may recover actual damages or a penalty of up to thousand dollars (\$1,000) per email
 16 (reduced to a maximum of \$100 per email if "defendant established and implemented, with due
 17 care, practices and procedures reasonably designed to effectively prevent unsolicited commercial e-
 18 mail advertisements that are in violation of this section"). Cal. Bus. & Prof. Code §
 19 17529.5(b)(1)(B). However, in *Phillips v Netblue, Inc.*, the court unequivocally stated that while
 20 section 17529.5 does indeed permit recovery of "either or both" actual or statutory damages, the
 21 statutory damage portion of the statute is penal in nature. In *Phillips v Netblue, Inc.*, No. C-05-4401
 22 SC, 2006 WL 3647116 at *5 (N.D. Cal. Dec 12, 2006). After determining that the statutory damages
 23 under the Federal CAN-SPAM Act were penalties, the court found that the statutory damages
 24 available under § 17529.5 have an "overwhelming penal purpose" because there are criminal
 25 penalties available for violations of its prohibitions. *Id.* at *6; Cal. Bus. & Prof. Code § 17529.5(c).
 26 The court stated, "by allowing a plaintiff to recover 'either or both' of actual damages and statutory
 27 damages, this section makes clear that the two kinds of damages are different and thus logically
 28 serve different purposes: compensatory in the case of the former and penal in the case of the latter."

1 Id. at *5. Accordingly, in the absence of actual damages, there is no claim for “recovery of money”
2 and small claims jurisdiction is improper.

3 In this action, Balsam seeks to use the small claims courts to impose the statutory penal
4 penalties described in § 17529.5, while neglecting to plead any actual compensatory damages. The
5 small claims courts were not designed to permit individuals to seek statutory penalties, but rather
6 were created to permit the recovery of money for actual damages in an efficient, inexpensive and
7 compensatory manner. The judicial procedures for resolving small claims were designed to promote
8 the legislative purpose of resolving “minor civil disputes expeditiously, inexpensively, and fairly.”
9 Cal. Code Civ. Pro. § 116.120; *General Electric Capital Auto Financial Services, Inc. v. Appellate*
10 *Division*, 88 Cal. App. 4th 136, 142, (2001).

11 The legislature established the small claims divisions to provide an accessible judicial forum
12 to resolve individual “minor civil disputes.” See Code of Civil Procedure § 116.120(a), (b) and (c).
13 The claim brought here is anything but a “minor civil dispute.” Instead, this claim involves the
14 judicial determination of a complicated and unresolved area of law, involving federal preemption
15 and implicating the U.S. Constitution’s Dormant Commerce Clause. The instant action necessarily
16 requires the court to make extensive and complex legal and factual findings, some of which involve
17 complex high technology. Because of the complexity of this matter, both factually and legally, the
18 need for significant factual development, the penal nature of the claim and the potential for abuse by
19 plaintiffs such as Balsam, this action is not an appropriate case for the small claims court.
20

21 **2. Plaintiff Is Improperly Using The Small Claims System To**
22 **Disadvantage Defendant.**

23 Balsam has instituted multiple small claims actions against defendants from distant venues
24 in order to disadvantage them. This should not be permitted. While surely there must be advertisers
25 in the Bay Area that Balsam could file these amorphous claims against, he has chosen, in every case
26 defendant has been able to identify, to sue out-of-state defendants or California defendants located
27 outside of the Bay Area.

28 The filing of a lawsuit in a distant venue for the ulterior motive of impairing a defendant’s

1 rights to defend the suit and/or to coerce inequitable settlements and default judgments has been
2 found to be an actionable abuse of process, even if the venue is technically proper. *Barquis v.*
3 *Merchants Collection Ass'n of Oakland, Inc.*, 7 Cal. 3d 94, 107-108 (1972) (finding abuse of process
4 where defendants had a "pattern and practice" of knowingly filing actions in distant counties in
5 order to gain an unconscionable advantage in the small claims case); *Yu v. Signet Bank/Virginia*,
6 103 Cal. App. 4th 298, 311 (2002) (recognizing that filing a lawsuit in a distant venue can be an
7 abuse of process). The judiciary "has a strong interest in eliminating any systematic misuse of the
8 judicial machinery." *Id.* at 107.
9

10 III. CONCLUSION

11 Based on the foregoing, defendant World Avenue prays for judgment against plaintiff Balsam
12 as follows:

- 13 1. That plaintiff take nothing by way of his claims and complaint;
- 14 2. That judgment be entered in favor of defendant World Avenue U.S.A., LLC;
- 15 3. That defendant World Avenue be awarded its costs;
- 16 4. Such other and further relief as the Court may deem just and proper.
17

18 Dated: April 10, 2008

ROTHKEN LAW FIRM LLP

19
20 By: 

21 Ira P. Rothken
22 Attorneys for Defendant
23 World Avenue U.S.A., LLC
24
25
26
27
28

PROOF OF SERVICE

Balsam v. World Venue U.S.A., LLC
San Francisco Superior Court Case No. 821162

I am over the age of 18 years, employed in the county of Palm Beach, Florida, and not a party to the within action; my business address is 6001 Broken Sound Parkway, Second Floor, Boca Raton, FL 33487.

On April 10, 2008 I served the within:

DEFENDANT WORLD AVENUE U.S.A., LLC'S SMALL CLAIMS APPEAL TRIAL BRIEF
on the parties in said action in Court via HAND DELIVERY on:

Daniel L. Balsam
3145 Geary Blvd., #225
San Francisco, CA 94118

I declare under penalty of perjury under the laws of the State of California and the State of Florida that the foregoing is true and correct.

Executed on April 10, 2008.

